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The Bill of Rights and the States Revisited After *Heller*

MICHAEL KENT CURTIS*

INTRODUCTION

Most Americans believe that the United States is a land of liberty. They probably assume we have been protected by the Bill of Rights since its ratification in 1791. But, we have not always been. From 1833 until at least the 1930s,¹ liberties in the Bill of Rights were largely a matter of state option.

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1. Many cases have rejected application of the Bill of Rights against the states. *See, e.g.*, *Palko v. Connecticut*, 302 U.S. 319, 320 (1937) (“The Fourteenth Amendment does not guarantee against state action all that would be a violation of the original bill of rights (Amendments I to VIII) if done by the Federal Government.”); *Twining v. New Jersey*, 211 U.S. 78, 92–93 (1908) (“[B]y a long line of decisions the first ten Amendments are not operative on the States.”); *United States v. Cruikshank*, 92 U.S. 542, 552 (1876) (refusing to apply the First and Second Amendments against the state government). But other early cases did apply the Bill of Rights against the states. *See, e.g.*, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (“It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action.”); *Stromberg v. California*, 283 U.S. 359, 368 (1931) (“[T]he opportunity for free political discussion . . . is a fundamental principle of our constitutional system. A statute which . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.”); *cf.* *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (holding in the particular facts of this capital case that “the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment”); *Stromberg*, 283 U.S. at 368–69 (“[T]he State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means.”).

I have written extensively on the topic of application of liberties in the Bill of Rights to the states. *See, e.g.*, MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* (2000) [hereinafter CURTIS, *FREE SPEECH*]; MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986) [hereinafter CURTIS, *NO STATE*]; Michael Kent Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 WAKE FOREST L. REV. 45 (1980); Michael Kent Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. 89 (1982) [hereinafter Curtis, *Further Adventures*]; Michael Kent Curtis,

In *Barron v. Baltimore*, the Court rejected a landowner's claim for compensation under the Takings Clause.² His wharf had become inaccessible after the City of Baltimore dumped dirt and gravel from a road repair project around it.³ Chief Justice John Marshall rejected application of the Bill of Rights to the states as unthinkable: "Had the people of the several states . . . required additional safeguards to liberty from the apprehended encroachments of their [state] governments," he wrote, "the remedy was in their own hands . . ."⁴ They could have amended their state constitutions: "The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of congress, and the assent of three-fourths of their sister states, could never have occurred to any human being as a mode of doing that which might be effected by the state itself."⁵

The Chief Justice was mistaken. The unthinkable idea had occurred to James Madison, the father of the Bill of Rights. Madison's proposal for a Bill of Rights had included specific limits on the states in the interest of protecting liberty.⁶ Madison had provided that "no State shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases."⁷ He made this proposal "because it is proper that every Government should be disarmed of powers which trench upon those particular rights."⁸ Madison recognized that some state constitutions guaranteed these rights, but he thought it wise to obtain "double security on those points" because "State Governments are as liable to attack these invaluable privileges as the General Government is, and therefore ought to be as cautiously guarded against."⁹ The House of Representatives agreed with Madison, though it thought he did not go

Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States, 78 N.C. L. REV. 1071 (2000) [hereinafter Curtis, *Historical Linguistics*]; Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1 (1996); Michael Kent Curtis, *Still Further Adventures of the Nine-Lived Cat: A Rebuttal to Raoul Berger's Reply on Application of the Bill of Rights to the States*, 62 N.C. L. REV. 517 (1984) (Mr. Berger's rejoinders are cited in each of the foregoing pieces). This piece is the second recent overview I have written. For the first, more extensive one, see Michael Kent Curtis, *The Bill of Rights and the States: An Overview From One Perspective*, 18 J. CONTEMP. LEGAL ISSUES (forthcoming Sept. 2009) [hereinafter Curtis, *Bill of Rights*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334687.

2. 32 U.S. (7 Pet.) 243, 250-51 (1833).

3. *Id.* at 243-44.

4. *Id.* at 249.

5. *Id.* at 250.

6. 1 ANNALS OF CONG. 438-42 (Joseph Gales ed., 1789).

7. *Id.* at 440-41.

8. *Id.* at 441.

9. *Id.*

far enough. It added free speech to the list.¹⁰ The plan was rejected in the Senate.¹¹

Before the Civil War, the Court continued to reject claims that liberties in the Bill of Rights limited the states.¹² A number of distinguished people saw the matter differently.¹³ They believed that, properly understood, the Constitution did require the states to respect its guarantees of liberty, though they differed on whether the guarantees were legally enforceable under a proper understanding of the law.¹⁴

The Fourteenth Amendment, passed by Congress in 1866 and ratified by the states by 1868, should have changed things. The Amendment provides that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”¹⁵ It then listed new protections for citizens and persons:

No State shall make or enforce any law which shall abridge *the privileges or immunities of citizens of the United States*; nor shall any State *deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁶

The Fourteenth Amendment was designed to give the nation a new birth of freedom. It limited the semi-sovereign state in the interest of greater national protection for liberty and equality. The pre-Civil War semi-sovereign state had been free to deny, selectively or generally, basic Bill of Rights liberties.¹⁷ It had been free to discriminate based on color

10. 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1089 (Leon Friedman et al. eds., 1971).

11. *Id.* at 1145–46.

12. *E.g.*, *Permoli v. New Orleans*, 44 U.S. (3 How.) 589, 609 (1845) (“The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws . . .”); *Livingston v. Moore*, 32 U.S. (7 Pet.) 469, 517–18 (1833) (refusing to apply the constitutional right to a jury trial to civil cases).

13. Georgia Supreme Court Chief Justice Joseph Henry Lumpkin is one example. *See* *Campbell v. State*, 11 Ga. 353, 365–73 (1852) (discussing the uselessness of “shield[ing] [the people] from a blow aimed by the Federal arm, if they are liable to be prostrated by one dealt with equal fatality by their own” and citing previously-decided cases in various jurisdictions applying the Bill of Rights against the states); *Nunn v. State*, 1 Ga. 243, 249–51 (1846) (declaring unconstitutional a state statute prohibiting the right to bear arms and discussing other cases where the Bill of Rights was applied against the state). A number of leading Republicans at the time felt this way as well. CURTIS, *NO STATE*, *supra* note 1, at 49–56.

14. *See supra* note 13; *see also* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 145–56 (1998) (discussing *Barron* contrarians); CURTIS, *FREE SPEECH*, *supra* note 1, at 284–88 (recounting the views of Republicans in Congress in 1860); CURTIS, *NO STATE*, *supra* note 1, at 60–61 (discussing views of John A. Bingham in 1859); *id.* at 49–56 (surveying the views of various Republican congressmen around the time of the Civil War).

15. U.S. CONST. amend. XIV, § 1.

16. *Id.* (emphasis added).

17. *See, e.g.*, *Permoli*, 44 U.S. at 589; *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833) (holding that the Fifth Amendment did not apply against the states); *cf. Scott v. Sandford*

and many states (including some in the North), had done so, denying blacks both fundamental rights and basic common law rights.¹⁸

I. UNDERSTANDING SECTION 1 OF THE FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment and its Privileges or Immunities Clause can best be understood from multiple perspectives: textual analysis; contextual or intertextual analysis; historical context—including the grievances that gave rise to the amendment, original meaning of the words, and the purposes of its leading framers; ethical aspirations; sound public policy; and arguments from constitutional structure.¹⁹ While conceptually distinct, these methods sometimes overlap. I do not embrace the idea that one factor alone should establish constitutional meaning. The better *legal* rule results from considering them all. This discussion focuses heavily on history, which is one, but only one, factor to consider.²⁰

II. DUELING THEORIES

This Article provides some context relevant to application of the Second Amendment to the states. Section 1 of the Fourteenth Amendment in general, and the Privileges or Immunities Clause in particular, have been read in two major ways. First, one can read Section

(*Dred Scott*), 60 U.S. (19 How.) 393, 407 (1857) (holding that Americans descended from slaves were not citizens).

18. Cf. *Dred Scott*, 60 U.S. at 407 (holding that slaves and their decedents were not citizens of the United States). For a survey of Northern laws, see Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 *RUTGERS L.J.* 415, 421–25 (1986).

19. My discussion of multiple means of analysis is indebted to the work of Phillip Bobbitt, Charles Black, Akhil Amar, William W. Crosskey, and Michael Conant, to whom I am indebted for the term and concept of “historical linguistics.” For scholars who have greatly enriched the case for application, the reader is urged to consult the very important works of Richard Aynes, and Bryan Wildenthal. See, e.g., Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 *U. PA. J. CONST. L.* 1295 (forthcoming July 2009) (manuscript on file with the Hastings Law Journal); Richard L. Aynes, *On Misreading John A. Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57 (1993) [hereinafter, Aynes, *Misreading*]; Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 *OHIO ST. L.J.* 1509 (2007) [hereinafter, Wildenthal, *Revisiting*]; Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867–73*, 18 *J. CONTEMP. LEGAL ISSUES* (forthcoming Sept. 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354404#.

20. Several scholars have explored other factors as well. See AMAR, *supra* note 14, at 163–214; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193, 1198–284 (1992) (discussing the historical context, text, and incorporation cases); Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 *EMORY L.J.* 785, 819 (1982) (discussing historical linguistics); William Winslow Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 *U. CHI. L. REV.* 1 (1954) (advocating for the inclusion of prior case law in a historical-context analysis of the Fourteenth Amendment). See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982). I am indebted to my colleague Wilson Parker who first alerted me to the various methods of interpretation.

1 (and particularly the Privileges or Immunities Clause) as protecting both equality and basic liberties for Americans throughout the nation against state denial or abridgement. Second, one can read Section 1 of the Privileges or Immunities Clause as simply, and only, prohibiting racial and similar caste discrimination in rights provided by—and revocable under—state law.²¹ By the first reading, all persons would have rights, for example, to free speech and to bear arms (assuming, as I do, that the right was considered an individual constitutional right of all citizens by 1868) and these rights or privileges would be protected at least against state denial. By the second reading, a state could not take free speech or the right to keep and bear arms away from African Americans if it granted the right to whites. But it could abridge the right for both.

The two readings use different historical contexts. The second reading focuses on discrimination against African Americans in 1866 and assumes that discrimination was what shaped the Amendment. By the second reading, the right of African Americans to keep and bear arms would be protected so long as the right was allowed to whites. But if it were denied to all, it would not be protected for blacks. When all are deprived of the right, no one suffers racial discrimination. The same is true for free speech.

The first reading looks at a longer and larger historical context and assumes that the Fourteenth Amendment was shaped both by discrimination against African Americans *and* by a long history of abridging constitutional rights for whites as well as blacks. It assumes that the Privileges or Immunities Clause protected basic national, constitutional rights that states could not deny, even if the state deprived everyone of the right. The Due Process Clause did a similar thing for many rights of persons. This national-rights reading finds protection for equality under the Equal Protection Clause. The national-constitutional-rights approach reads the Privileges or Immunities Clause to protect constitutional rights. As a result, these would include the equality rights in Article IV, whatever they were understood to be.

This Article will say a lot about free speech. In a piece on the right to bear arms, this may strike the reader as very odd. Complaints about denials of free speech are instructive, however. Republican complaints about denials of free speech—as an example of state denial of constitutional rights—cannot be explained as aimed at racial discrimination alone or at discrimination against those from out of state

21. For somewhat different equality-only approaches, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 155–89 (1997); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1410–33 (1992).

alone. One might attempt such an explanation as to the denial of the right of blacks to possess arms in the South after the Civil War, seeing the problem as only racial discrimination in rights the state could grant or withhold by state law.

But reading Section 1 as limited to racial discrimination against those from out of state does not explain references to free speech and similar constitutional rights. These, like free speech, would be absolute in the sense that states could not deny them, even if they did so for all. Before the Civil War, whites, blacks, out-of-state visitors, in-state residents got the same free speech rights to criticize slavery—because denials of the right to free speech on slavery applied equally to both whites and blacks and to the in-state resident and the out-of-state visitor.²² Complaints about denials of free speech in the South, coupled with general complaints about denials of constitutional rights, such as the right to bear arms, show that absolute, not relative, rights were at issue.²³ In the company of references to “all rights of citizens” or “rights of citizens enumerated in the Constitution,” free speech is a metonymy. That part of the Bill of Rights (and indeed a part of all constitutional rights) stands for the whole.

III. MULTIPLE METHODS OF ANALYSIS

A. TEXT

The text of the Fourteenth Amendment supports application of liberties in the Bill of Rights to the states. First, it creates national and state citizenship for all persons born or naturalized in the United States and subject to its jurisdiction.²⁴ “No state shall” is obviously designed to limit the states in some new way. They are not to “abridge” (deny, reduce, or lessen) the “privileges” (federal rights) “of” (shared by all) “citizens of the United States.” One obvious place to look for these rights is in the rights listed in the Constitution. From reading the text of the Fourteenth Amendment, it appears that states had been depriving American citizens of their privileges or immunities, depriving them of equal protection, and denying them life, liberty, or property without due process. This was to stop.

Webster's Dictionary defines “privilege” as “A right or immunity, or benefit enjoyed by a particular person or a restricted group of persons,” and as “Any of the rights common to all citizens under modern

22. See, e.g., CURTIS, *FREE SPEECH*, *supra* note 1, at 261–62 (discussing Virginia statutes, including one aimed at including all in-state whites); *id.* at 262–63 (discussing prosecution of a white minister in North Carolina for giving an antislavery book to a white teenage girl); *id.* at 289–99 (discussing North Carolina prosecution of another white minister).

23. CURTIS, *NO STATE*, *supra* note 1, at 29–32 (discussing free speech).

24. U.S. CONST. amend. XIV, § 1.

constitutional government.”²⁵ The rights in the Bill of Rights are shared by all United States citizens.²⁶

There is a difference between the right (or “privilege” or “immunity”) and the security the law provides for it. For example, the First Amendment contains rights or freedoms: “the freedom of speech, or of the press.”²⁷ It also contains limited security for those rights: “Congress shall make no law . . . abridging” them.²⁸ The rights are recognized and Congress is forbidden from abridging them. So, by interpretation, are the other branches of the *federal* government. After *Barron v. Baltimore*, all rights in the Bill of Rights were protected only by a limited security device. They were secured only against federal power.²⁹

As James Madison said in his speech presenting a bill of rights to the Congress, the English had rights to trial by jury, freedom of the press, and rights of conscience.³⁰ But the rights were not secured.

I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision *for the security of those rights, respecting which the people of America are most alarmed*. The freedom of the press and rights of conscience, *those choicest privileges of the people*, are unguarded in the British Constitution.³¹

As this makes clear, Madison distinguished the right from the security device to protect it. The British had the right, but no adequate security device for it. Some American states lacked security for at least some of the rights.³² Some states did have a security device—constitutional protection—but Madison thought “double security” would be a good idea.³³ The ship of state should have lifeboats as well as a double hull.³⁴ The Fourteenth Amendment assumed that Americans had constitutional rights they all shared—and that needed to be secured against state abridgment.

But were the words “privileges or immunities of citizens of the United States” an apt way to describe the liberties and immunities in the

25. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1074 (1991).

26. See, e.g., U.S. CONST. amends. I–VIII. Note also the references to the “right of the people” in the right to assemble and petition, and in the Fourth Amendment. All the amendments are rights shared by the people of the United States, as is apparent from their wording.

27. *Id.* amend. I.

28. *Id.*

29. See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250–51 (1833).

30. 1 ANNALS OF CONG. 436–42 (Joseph Gales, ed., 1789).

31. *Id.* at 436 (emphasis added).

32. THE FEDERALIST No. 84, at 466–67 (Alexander Hamilton) (E.H. Scott ed., 1898).

33. 1 ANNALS OF CONG. 441 (Joseph Gales, ed., 1789).

34. The metaphor is from Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 23–24 (1988).

Bill of Rights? Yes. By 1868, there was a long history of describing liberties such as those in the Bill of Rights as privileges or immunities.³⁵ There was also a long history of describing them, as Madison did, as rights of the people of the United States.³⁶ They were often also referred to as rights under the Federal Constitution or as rights of American citizens.³⁷ There are several examples of this usage continuing up to, through, and well beyond the Civil War.³⁸ These examples show that the word "privilege" was equivalent to the word "right," and that "privilege" was commonly used to describe constitutional rights.³⁹ After the ratification of the Bill of Rights, the Constitution's rights were described as privileges and as rights of American citizens.⁴⁰ Here I will give some examples; for others I encourage interested readers to consult the sources cited in the notes.⁴¹

The use of the words "privilege" and "immunity" as encompassing basic rights predates the Constitution. In the *Writs of Assistance Case*, James Otis argued against general warrants as an invasion of the "freedom of one's house."⁴² He said that "[t]his writ, if it should be declared legal, would totally annihilate this *privilege*."⁴³ *Cato's Letters* were essays on liberty and were pervasively reprinted in the colonies.⁴⁴ Cato describes "Freedom of Speech" as the "*Right of every Man*," and according to Cato, "[t]his sacred *Priviledge*" was "essential to free Governments."⁴⁵

When the judges in the William Penn trial threatened the jury for bringing in a verdict of not guilty, Penn saw the action as an attack on the right to jury trial.⁴⁶ He urged his jurors to "mind your *privilege*, give not away your right."⁴⁷ Before the Revolution, Benjamin Franklin, writing as "Silence Dogood," explained that "I am naturally very jealous for the Rights and Liberties of my Country; & the least appearance of an

35. See generally Curtis, *Historical Linguistics*, *supra* note 1, at 1071-151 (describing the historic use of the words privileges or immunities).

36. 1 ANNALS OF CONG. 431-69 (Joseph Gales ed., 1789).

37. Curtis, *Historical Linguistics*, *supra* note 1, *passim*.

38. *Id.* at 1071-152.

39. *Id.*

40. *Id.*

41. AMAR, *supra* note 14; Conant, *supra* note 20; Curtis, *Historical Linguistics*, *supra* note 1, at 1071-152.

42. John Adams, *Abstract of the Argument*, in 2 LEGAL PAPERS OF JOHN ADAMS 134, 142 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

43. *Id.*

44. *Id.*

45. Zenger's *Journal Presents "Cato,"* in FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 10, 11 (Leonard W. Levy ed., 1996) (emphasis added).

46. *The People's Ancient and Just Liberties Asserted, in the Trial of William Penn and William Mead*, in 1 SELECT WORKS OF WILLIAM PENN 79-96 (3d ed. 1782).

47. *Id.* at 98.

Incroachment on those *invaluable Priviledges*, is apt to make my Blood boil exceedingly.”⁴⁸ William Blackstone describes the right to trial by jury as “the most transcendent *privilege* which any subject can enjoy.”⁴⁹ Indeed, Blackstone describes all the rights set out in the great documents of English liberty as “privileges” or “immunities.”⁵⁰ The usage is common in American revolutionary declarations, describing all the basic rights of the English as “all the privileges, immunities, and advantages of the people of Great Britain” and describing trial by jury by peers of the vicinage, according to due course of law, as “*the great and inestimable privilege*.”⁵¹

In the debate on the Sedition Act,⁵² Congressman Edward Livingston said that the Constitution provided that “*no law shall be passed to abridge the liberty of speech and of the press. . . . This privilege is connected with another dear and valuable privilege—the liberty of conscience*.”⁵³

In the 1830s, Elijah Lovejoy was a minister and antislavery newspaper editor in Missouri, whose printing presses had been repeatedly seized and destroyed by mobs.⁵⁴ Lovejoy took refuge in Alton, Illinois, but mobs pursued him there and again destroyed his press.⁵⁵ Lovejoy was ultimately killed defending his fourth press from a mob.⁵⁶ His death produced massive protests, and, together with other mob attacks on abolitionists, it reframed the slavery issue.⁵⁷

Newspaper editorials and public meetings condemned the killing as an attack on free speech and press, and on the rights of citizens of the United States. “Freedom of opinion and of the press,” the *Baltimore Lutheran Observer* insisted, “is an inalienable privilege secured to us by our political magna charta”⁵⁸ Citizens of the country would not

48. Silence Dogood, Letter to the Editor, *Silence Dogood No. 2*, NEW-ENGLAND COURANT, Apr. 16, 1722, reprinted in BENJAMIN FRANKLIN, WRITINGS 8 (J.A. Leo Lemay ed., 1987) (emphasis added).

49. 3 WILLIAM BLACKSTONE, COMMENTARIES *379 (emphasis added).

50. See *id.* at *90–100.

51. A.E. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 175, 180 (1968) (emphasis added).

52. Ch. 74, 1 stat. 596 (1798).

53. 8 ANNALS OF CONG. 2153 (1798) (emphasis added).

54. CURTIS, FREE SPEECH, *supra* note 1, at 216–17.

55. *Id.*

56. *Id.*

57. *Id.* at 216–29. For early and important work on speech suppression, see generally CLEMENT EATON, THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH (Harper & Row 1964) (1940); RUSSELL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860 (1949); and W. SHERMAN SAVAGE, THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE 1830–1860 (1938).

58. *Testimonies of the Spirit of Liberty*, 2 EMANCIPATOR 129 (1837) (quoting the *Baltimore Lutheran Observer*).

"consent to surrender this inestimable privilege."⁵⁹ A resolution from a New York meeting of young men described "liberty of the press, [and] of speech" as "prerogatives of a free people," and insisted that "their exercise is guaranteed to every citizen by the Federal Constitution."⁶⁰ A New Hampshire paper described Lovejoy as battling to protect freedom of speech and press and "all the sacred rights secured to the citizens by the Constitution of these U.S."⁶¹ The *Newark Daily Advertiser* described "the right of free discussion" as an "inalienable privilege of a freeman."⁶²

In his 1841 inaugural address, President William Henry Harrison said that the American Constitution both granted and withheld power.⁶³ In contrast to the sovereignty of ancient Greece or Rome, American sovereignty could "interfere with no one's faith, prescribe forms of worship for no one's observance, inflict no punishment but after well-ascertained guilt, the result of investigation under rules prescribed by the Constitution itself," a reference to many of the guarantees of the Bill of Rights.⁶⁴ "These precious privileges," and those of "giving expression to his thoughts and opinions," were not only rights conferred by constitutions, they were basic human rights.⁶⁵

As President Harrison did, it was common to describe rights in the Federal Bill of Rights, and comparable rights in state bills of rights, as privileges or immunities. Both courts and lawyers used the words in this way. State courts referred, for example, to the privilege and immunity of grand jury indictment,⁶⁶ the protection against double jeopardy (the privilege),⁶⁷ the privilege of the accused to have counsel,⁶⁸ the right to worship according to conscience and against giving preference to any religion ("these religious privileges, secured by these sections of the constitution of the republic and state"),⁶⁹ and "the freedom of religious profession and worship" (a "constitutional privilege").⁷⁰

In federal court, Chief Justice Marshall referred to the "valuable privilege" of the accused of being confronted by his accuser;⁷¹ Justice

59. *Id.* (quoting the *Baltimore Lutheran Observer*).

60. *Meeting of Young Men in New York*, 2 EMANCIPATOR 154 (1838).

61. *Testimonials of a Free Press*, EMANCIPATOR EXTRA, Feb. 12, 1838, at 2 (quoting the *New Hampshire Courier*).

62. *The Voice of the Public Press*, 2 EMANCIPATOR 120 (1837) (quoting the *New York Daily News*).

63. Curtis, *Historical Linguistics*, *supra* note 1, at 1115.

64. William Henry Harrison, Inaugural Address of William Henry Harrison (Mar. 4, 1841), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO HARRY S. TRUMAN 1946, at 63-64 (1952).

65. *Id.* (emphasis omitted).

66. *See, e.g.*, *Joues v. Robbins*, 74 Mass. (8 Gray) 329, 344 (1857).

67. *See, e.g.*, *Sutcliffe v. State*, 18 Ohio 469, 477-79 (1849).

68. *See, e.g.*, *People v. Keenan*, 13 Cal. 581, 584 (1859); *Dean v. State*, 43 Ga. 218, 220 (1871).

69. *See Gabel v. City of Houston*, 29 Tex. 335, 344-45 (1867).

70. *Ex parte Newman*, 9 Cal. 502, 514 (1858) (emphasis omitted).

71. *United States v. Burr*, 25 F. Cas. 27, 29 (Marshall, Circuit Justice, D. Va. 1807) (No. 14,692c).

Bushrod Washington referred to the “privilege of having the assistance of counsel,”⁷² and Justice William Johnson used the words “privileges” and “immunities” as equivalent to constitutional rights listed in a “bill of rights.”⁷³

In *Prigg v. Pennsylvania*, counsel for Pennsylvania argued that allowing seizure and removal of an alleged slave from the state by her alleged owner without a due process hearing violated the Fourth Amendment guarantee against unreasonable seizures.⁷⁴ Until the person was proved a slave, counsel argued, he was presumed free, “and, therefore, if you seize him, it is a violation of this *constitutional privilege*.”⁷⁵ In another widely publicized case, General Ambrose Burnside arrested former Democratic Congressman Clement Vallandigham for making an anti-war speech and tried him before a military commission—all in apparent violation of his right to grand jury indictment and jury trial as well as of his right to free speech.⁷⁶ Vallandigham’s lawyer argued that the action was a “sacrifice of our ancestral rights, by the destruction of our *constitutional privileges*.”⁷⁷

Another type of textual analysis is intratextual. It focuses on how words are used in other parts of the Constitution.⁷⁸ For example, the original constitutional limits on the states in the interest of liberty in Article I, Section 10, are prefaced with the words “no state shall.”⁷⁹

Text is one way to understand the meaning of a constitutional provision. Inevitably there are always various ways to read the words in the text—though some seem to me better than others. Meaning is contextual. So for the best understanding of meaning, we should look at the historical context. In the case of the Fourteenth Amendment, a broader context is needed—broader than the context one gets just from looking at selected parts of the historical record in 1866.

History on questions of this sort is always somewhat mixed. One can never prove that all understood a constitutional provision in the same

72. *Ex parte Craig*, 6 F. Cas. 710, 711 (Washington, Circuit Justice, C.C.E.D. Pa. 1827) (No. 3321).

73. *Am. Ins. Co. v. Canter*, 1 F. Cas. 658, 660 (Johnson, Circuit Justice, C.C.S.C. 1800) (No. 302a).

74. 41 U.S. (16 Pet.) 539, 576 (1842).

75. *Id.* at 579 (emphasis added).

76. See generally *Ex Parte Vallandigham*, 28 F. Cas. 874 (C.C.S.D. Ohio 1863) (No. 16,816). For a discussion of the case, see Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 121–31 (1998).

77. *Vallandigham*, 28 F. Cas. at 880; see also *Scott v. Sandford* (*Dred Scott*), 60 U.S. (19 How.) 393, *passim* (1857) (using the words “right” and “privilege” interchangeably); Curtis, *Historical Linguistics*, *supra* note 1, at 1131 (quoting Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 654 (Carolina Academic Press 1987) (1833)). For usage during the Civil War, see CURTIS, *FREE SPEECH*, *supra* note 1, at 316, 332–33; and Curtis, *Historical Linguistics*, *supra* note 1, at 1123.

78. Akhil Reed Amar, *Intertextualism*, 112 HARV. L. REV. 747, 788 (1999).

79. See U.S. CONST. art. I, § 10.

way, or that the words were capable of only one sort of meaning. Historical context helps to reduce ambiguity as to the historical meaning. Additionally, the existence of some contrary evidence is not alone sufficient to dismiss a historical hypothesis relevant to the legal meaning of the text.

B. HISTORICAL CONTEXT AND THE GRIEVANCES THAT GAVE RISE TO THE AMENDMENT

The original Constitution was defective. It sought to protect two ultimately incompatible systems—slavery and liberty. As Congressman William Newell explained in 1866, “this Constitution of our fathers” contained “an element foreign to its genius and principles, flatly subversive of the ideas on which it was founded, and which gave the lie direct to its declaration of rights.”⁸⁰

After the Revolution, Northern states abolished slavery, some more slowly than others.⁸¹ Abolition in the North left the nation divided between free and slave states.⁸² In the 1830s, abolitionists began to reframe the slavery question. Abolitionist speakers traveled throughout the North, preaching the gospel of abolition.⁸³ They published tracts and newspapers; they held meetings.⁸⁴

The response to the call for “abolition now” was furious.⁸⁵ Mobs in the North broke up abolition meetings, destroyed the presses of abolition newspapers, and demanded that the abolitionists shut up.⁸⁶ The violence was rationalized, of course. Critics insisted that raising the slavery question threatened slave revolts and disunion; slavery was none of the North’s concern.⁸⁷ Southern states demanded that the North silence abolitionists by law, but no nonslave state complied.⁸⁸ The issue would not go away. The effort to shut up the abolitionists reframed the issue. It was now a question of liberty of speech, press, and opinion for people in the North. Moreover, the more the nation acquired new territory, the more acute the slavery question became. The South insisted on new

80. CONG. GLOBE, 39th Cong., 1st Sess. 866 (1866).

81. RICHARD H. SEWELL, *BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837–1860*, at 3–5 (1976).

82. DAVID M. POTTER, *THE IMPENDING CRISIS 1848–1861*, at 52–54 (1963).

83. CURTIS, *FREE SPEECH*, *supra* note 1, at 127–28.

84. *Id.* at 128.

85. *Id.* at 129–54.

86. *See generally* CURTIS, *FREE SPEECH*, *supra* note 1; NYE, *supra* note 57, at 156–61; LEONARD RICHARD, *GENTLEMEN OF PROPERTY AND STANDING: ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA* (1970); Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–1837*, 89 NW. U. L. REV. 785 (1995).

87. CURTIS, *FREE SPEECH*, *supra* note 1, at 133–36.

88. *See id.* at 182–87.

territory and new guarantees for slavery.⁸⁹ Many Northerners resisted Southern demands.⁹⁰

Increasingly, slavery became the central political issue facing the nation.⁹¹ The repeal of the Missouri Compromise in 1854 galvanized opponents of slavery.⁹² Northern Democrats who had supported the repeal were decimated in congressional elections.⁹³ The Republican Party, the latest and strongest in a succession of antislavery parties, sprang into existence in 1854 and made a strong run for the presidency in 1856.⁹⁴ The central plank of its platform was not abolition but exclusion of slavery from all national territories.⁹⁵ This idea had broad appeal in the North.⁹⁶ The Southern elite found it intolerable.⁹⁷ The 1856 campaign slogan of the new Republican Party was "Free Speech, Free Press, Free Men, Free Territory, and Fremont."⁹⁸

The call for free speech was pertinent. The Republican Party was not able to exist or campaign in the South.⁹⁹ That was one fact on which Abraham Lincoln and Stephen A. Douglas agreed in their famous debates.¹⁰⁰ The South was a closed society. There were two mechanisms for prohibiting the Republican Party in the South—mobs and laws. A couple of examples from North Carolina show the system at work.

Benjamin Hedrick was a talented chemistry professor at the University of North Carolina at Chapel Hill.¹⁰¹ In 1856, he told some of his students that he favored the Republican candidate, John C. Fremont, for President.¹⁰² The *Raleigh Weekly Standard* got wind of the story and

89. *Id.* at 119–20.

90. *Id.* at 132.

91. *Id.* at 131.

92. DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 188 (1978).

93. CURTIS, *NO STATE*, *supra* note 1, at 27.

94. CURTIS, *FREE SPEECH*, *supra* note 1, at 265.

95. NATIONAL PARTY PLATFORMS 1840–1956, at 27, 32 (Kirk H. Porter & Donald Bruce Johnson eds., 1956) (describing Republican platforms of 1856 through 1860 calling for a ban on slavery in the national territories).

96. This is shown by the reaction to the repeal of the Missouri Compromise which had prohibited slavery north of latitude 36° 30', giving rise to the Republican Party. *See* FEHRENBACHER, *supra* note 92, at 185–92.

97. *E.g.*, Letter from Jefferson Davis to the Confederate Congress (Apr. 29, 1861), in 5 JEFFERSON DAVIS, *CONSTITUTIONALIST: HIS LETTERS, PAPERS, AND SPEECHES* 72 (Dunbar Roland ed., 1923); Michael Kent Curtis, *John A. Bingham and the Story of American Liberty, The Lost Cause Meets the "Lost Clause,"* 36 AKRON L. REV. 617, 619–20 (2003) (describing reasons for secession).

98. CURTIS, *FREE SPEECH*, *supra* note 1, at 281. *See generally* POTTER, *supra* note 82, at 247–65 (evolution of the Republican Party).

99. NYE, *supra* note 57, at 156–61.

100. *See* CURTIS, *NO STATE*, *supra* note 1, at 30–31.

101. CURTIS, *FREE SPEECH*, *supra* note 1, at 290.

102. *Id.*

outed Hedrick as a Republican.¹⁰³ The trustees of the University fired him from his job, and when he went home to Salisbury, North Carolina, the threat of mob violence drove him from the state.¹⁰⁴ The Raleigh newspaper was proud of its accomplishment; it exalted, "[o]ur object was to rid the University and the State of an avowed Frémont man; and we succeeded. And we now say . . . that no man who is avowedly for John C. Frémont for President ought to be allowed to breathe the air or tread the soil of North Carolina."¹⁰⁵

Slave states also had laws that punished antislavery expression. For example, a North Carolina statute punished distributors of any pamphlet or paper that had a "tendency" to make slaves or free blacks discontented.¹⁰⁶ In 1850, a Wesleyan minister had been sentenced to the pillory, whipping, and imprisonment for giving a teenage white girl a pamphlet that said slavery was inconsistent with the Ten Commandments.¹⁰⁷ He escaped punishment only by agreeing to leave the state.¹⁰⁸

In 1857, Hinton Helper, a North Carolinian, had published a book, *The Impending Crisis of the South*.¹⁰⁹ It argued that slavery was responsible for the economic backwardness of the South and depressed the condition of free white non-slaveholders (who were a substantial majority of the white population).¹¹⁰ Helper advocated peaceful political action in each slave state to abolish slavery.¹¹¹

Nearly half of the Republicans in the House of Representatives had endorsed a plan to publish a condensed version of Helper's book as a Republican campaign tract, including John Sherman, who was the Republican candidate for Speaker of the House from 1859 to 1860.¹¹² The speakership election coincided with the John Brown raid.¹¹³ Southerners and Democrats treated the Helper book as the textbook of revolution that inspired John Brown, and treated Republican endorsers as accessories before the fact to Brown's crime.¹¹⁴

103. *Id.*

104. *Id.*

105. *Mr. Hedrick, Once More*, RALEIGH WKLY. STANDARD, Nov. 5, 1856, at 1. Hedrick's case was typical. See Curtis, *supra* note 97, at 649 (discussing similar mob attacks).

106. An Act to Prevent Circulation of Seditious Publications and for Other Purposes, ch. 5, 1830-1831 N.C. Sess. Laws 10; CURTIS, FREE SPEECH, *supra* note 1, at 125.

107. CURTIS, FREE SPEECH, *supra* note 1, at 262-63.

108. *Id.* at 263.

109. HINTON ROWAN HELPER, *THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT* (George M. Fredrickson ed., Harvard Univ. Press 1968) (1857).

110. *Id.* at 40-45.

111. *Id.* at 149.

112. CURTIS, FREE SPEECH, *supra* note 1, at 272-75.

113. *Id.*

114. *Id.* at 274.

In 1859, Daniel Worth was another Wesleyan minister, preaching in Guilford and Randolph counties of North Carolina.¹¹⁵ He was a Republican Party activist and had been distributing copies of the Helper book and selling subscriptions to the Republican *New York Tribune*.¹¹⁶ Like Professor Hedrick before him, Worth was outed by the Raleigh newspaper, prosecuted for distributing copies of the Helper book, convicted, and sentenced to prison.¹¹⁷ The trial judge, however, refused to sentence the elderly minister to whipping, and allowed him to be free on bail pending appeal.¹¹⁸ Worth left the state.¹¹⁹ His conviction was upheld by the North Carolina Supreme Court on the theory that if distribution of Helper's book to whites was allowed, the book's ideas might reach blacks and slaves.¹²⁰ In 1860, the North Carolina legislature changed its incendiary documents statute to provide the death penalty for the first offense.¹²¹

Protecting the South from antislavery books required a censorship regime that included searches. In December 1859, the North Carolina Council of State passed a resolution saying postmasters who delivered incendiary books or newspapers should be prosecuted as circulators of the item.¹²² Another resolution instructed public officers to subject out-of-state merchants, book dealers, tract distributors, and lecturers to "the strictest scrutiny."¹²³

John A. Bingham, future author of most of Section 1 of the Fourteenth Amendment, was an endorser of the Helper book.¹²⁴ So were three of the seven Republicans on the Joint Committee on Reconstruction that reported the Amendment to the Congress.¹²⁵ So were the Speaker of the House in 1866 and the Chair of the House Judiciary Committee.¹²⁶ In the South, before the war, however, these men were viewed as felons, to be whipped and imprisoned if they came within the jurisdiction.¹²⁷ These attacks on their rights of free speech and political association did not sit well with Republicans.¹²⁸

115. *Id.* at 289–90.

116. *Id.*

117. *Id.*

118. *Id.* at 294–95.

119. *Id.* at 295.

120. *State v. Worth*, 52 N.C. (7 Jones) 488 (1860).

121. Act of Feb. 23, 1861, ch. 23, 1860–1861 N.C. Sess. Laws 39; CURTIS, FREE SPEECH, *supra* note 1, at 295–96.

122. CURTIS, FREE SPEECH, *supra* note 1, at 290 (citing *The Council of State*, RALEIGH WKLY. STANDARD, Dec. 14, 1859, at 1).

123. *Id.*

124. *Id.* at 360.

125. *Id.*

126. *Id.* For an early defense of a national right to free speech, see *id.* at 267.

127. *Id.* at 360.

128. *Id.* at 298–99.

In 1859, the House of Representatives considered the admission of Oregon to the Union.¹²⁹ The proposed state constitution prohibited free blacks, not already in the state, from entering it, from owning property in the state, from making contracts, and from bringing court actions.¹³⁰ Bingham insisted that (contrary to *Dred Scott*), free African Americans were citizens of the United States.¹³¹ He denied that “any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein.”¹³² Bingham said:

The citizens of each State, all the citizens of each State, being citizens of the United States, shall be entitled to “all privileges and immunities of citizens in the several States.” Not to the rights and immunities of the several States; not to those constitutional rights and immunities which result exclusively from State authority or State legislation; but to “all privileges and immunities” of citizens of the United States in the several States. There is an ellipsis in the language employed in the Constitution, but its meaning is self-evident that it is “*the privileges and immunities of citizens of the United States in the several states*” that it guaranties.¹³³

Among the privileges and immunities of citizens of the United States that states were required to respect were those in the Bill of Rights. Bingham said that the persons Oregon excluded were “citizens of the United States, and as such are entitled to all the privileges and immunities of citizens of the United States, amongst which are the rights of life and liberty and property, and their due protection in the enjoyment thereof by law.”¹³⁴ So the exclusion violated Article IV, Section 2, which, in addition to travel rights, also encompassed the Due Process Clause and other constitutional liberties. As a matter of constitutional obligation—albeit one that could not be enforced by Bingham’s view—the Bill of Rights limited the states even before the Civil War.

Such ideas were anathema to the Southern slaveholding elite. These ideas meant that free blacks had a right to come into the state, to speak, preach, assemble, and bear arms. These rights were substantially limited or flatly prohibited for a state’s own slaves and often for its free blacks.¹³⁵

129. CONG. GLOBE, 35th Cong., 2d Sess. 968 (1859).

130. *Id.* at 974.

131. *Id.* at 983; CURTIS, NO STATE, *supra* note 1, at 60.

132. CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).

133. *Id.* (emphasis added).

134. *Id.* at 984.

135. See, e.g., REVISED CODE OF NORTH CAROLINA 575 (Bartholomew F. Moore & Asa Biggs eds., 1855) (unlawful for free blacks to migrate into the state of North Carolina); *id.* at 574 (emancipated slaves generally required to leave the state within ninety days and not to return); *id.* at 578 (blacks, Indians, and persons of mixed blood, as defined, cannot be witnesses in court except against each—a blatant denial of due process); *id.* at 577 (free blacks may not have a shotgun, rifle, pistol, sword, etc.,

Even worse, these ideas meant that regulations imposed on the state's own free black population (against bearing arms, for example) would also violate Bill of Rights liberties.

Debates in Congress that preceded the framing of the Fourteenth Amendment show two things: deep Republican dissatisfaction with the protection that the liberties in the Bill of Rights were getting from the slave states (and others such as Oregon), and the view that these liberties were rights of American citizens that states should protect, not suppress.¹³⁶

In the acrimonious debates in 1860 over Helper's *Impending Crisis*, Republicans complained about the abuse of constitutional rights in the South. Republican Sidney Edgerton of Ohio said that "[f]or years, in most of the slaveholding States, the most sacred provisions of the Constitution have been wantonly and persistently violated. Where is the liberty of speech and of the press in the slaveholding states?"¹³⁷ Preachers could not "discuss the moral bearings of slavery."¹³⁸ He had studied the Helper book. Those who charged that it advised "insurrection, treason, servile war, arson, and murder" had "never . . . read the book."¹³⁹ Still, to sell this "harmless book in a slave state is considered a crime. Where is your constitutional liberty?"¹⁴⁰ The "liberty of South Carolina" was equivalent to "the despotism of Austria."¹⁴¹ Edgerton said the North demanded "the observance of constitutional obligations" and the protection of Northern citizens "in the enjoyment of their constitutional rights. She demands the freedom of speech and of the press; and if your peculiar institution cannot stand before them, let it go down."¹⁴²

According to Representative Henry Waldron of Michigan, the "slave Democracy" trampled the Constitution under foot.¹⁴³ "Today a

without a special license); *id.* at 576 (free persons of color generally may not preach or exhort to slaves of other families, or teach another slave or free blacks how to read); *id.* at 221 (free blacks going on board ships between sunset and sunrise to be punished by forty lashes); *see also* ALLISON GOODYEAR FREEHLING, *DRIFT TOWARD DISSOLUTION: THE VIRGINIA SLAVERY DEBATE OF 1831-1832*, at 188-93 (1982); CHARLES SYDNOR, *THE DEVELOPMENT OF SOUTHERN SECTIONALISM 1819-1848*, in 5 *A HISTORY OF THE SOUTH* 223, 226 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1948); ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE 1789-1868*, at 12-13, 109-10, 112 (2006) (general searches of slaves and slave cabins and restrictions on unlawful assembly for slaves and free blacks).

136. CURTIS, *NO STATE*, *supra* note 1, at 229 n.57; *see also, e.g.*, CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865) (Rep. Kasson); CONG. GLOBE, 38th Cong., 1st Sess. 114-15 (1864) (Rep. Arnold); *id.* at 1202 (1864) (Rep. Wilson); CONG. GLOBE, 36th Cong., 1st Sess. 930-31 (1860) (Rep. Edgerton).

137. CONG. GLOBE, 36th Cong., 1st Sess. 930 (1860); CURTIS, *FREE SPEECH*, *supra* note 1, at 284.

138. *Supra* note 137.

139. CONG. GLOBE, 36th Cong., 1st Sess. 930 (1860).

140. *Id.*

141. *Id.* at 930-31.

142. *Id.* at 931.

143. CONG. GLOBE, 36th Cong., 1st Sess. 1872 (1860).

system of espionage prevails which would disgrace the despotism and darkness of the middle ages. . . . Where slavery is there can be no free speech, no free thought, no free press, no regard for constitutions"¹⁴⁴

In the 1860 debate, Congressman Owen Lovejoy, brother of the slain antislavery editor, defended Helper's book and insisted on his constitutional right to recommend its circulation anywhere in the nation.¹⁴⁵ "I do claim the right of discussing this question of slavery anywhere, on any square foot of American soil over which the stars and stripes float, and to which the *privileges and immunities* of the Constitution extend. . . . [T]hat Constitution . . . guaranties to me free speech"¹⁴⁶ Lovejoy claimed "the privilege of going anywhere . . . as a free citizen, unmolested, and of uttering in an orderly and legal way, any sentiment that I choose to utter."¹⁴⁷ He complained that Southern states "imprison or exile preachers of the Gospel."¹⁴⁸

In 1860, when Jefferson Davis offered a resolution in the Senate opposing overt or covert attacks on slavery, Republican Senator James Harlan offered an amendment that got the support of every Senate Republican who voted on the issue.¹⁴⁹

But the free discussion of the morality and expediency of slavery should never be interfered with by the laws of any State, or of the United States; and the freedom of speech and of the press, on this and every other subject of domestic [state] and national policy, should be maintained inviolate in all the States.¹⁵⁰

Concern for slavery and its effect on civil liberty was a recurring theme in the debates over its abolition during the Civil War. In speaking in favor of a resolution for a constitutional amendment abolishing slavery, Representative James Wilson of Iowa (chairman of the Judiciary Committee in the Thirty-Ninth Congress) said that

[f]reedom of religious opinion, freedom of speech and press, and the right of assemblage for the purpose of petition belong to every American citizen, high or low, rich or poor, wherever he may be within the jurisdiction of the United States. With these rights no State may interfere without breach of the bond which holds the Union together.¹⁵¹

Still, slavery had practically destroyed these rights because it

persecuted religionists, denied the *privilege* of free discussion, prevented free elections, [and] trampled upon *all of the constitutional guarantees belonging to the citizen* [T]he blessings of our free

144. *Id.*

145. *Id.* app. at 205.

146. *Id.* (emphasis added).

147. *Id.*

148. *Id.*

149. *Id.* at 2321.

150. *Id.*

151. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

institutions were mere fables. An aristocracy enjoyed unlimited power, while the people were pressed to the earth and denied the *inestimable privileges* which by right they should have enjoyed in all the fullness designed by the Constitution.¹⁵²

While Wilson mentioned rights of speech, press, religion, and petition, his list was simply illustrative of denials of constitutional rights. He said that “slavery disregards the supremacy of the Constitution and denies to the citizens of each State the privileges and immunities of citizens in the several States.”¹⁵³

These excerpts from congressional debates from 1864 through 1866 show at least three things: (1) Republican concern with state abridgment of the liberties of American citizens; (2) a constitutional theory by which, under “proper” understanding, states were required to obey the basic liberties (the privileges or immunities of American citizens) set out in the Constitution; and finally (3) common usage of the words “privileges” or “immunities” to describe constitutional rights including those in the Bill of Rights. Were these ideas hidden under the dome of the Capitol? No.

1. *The End of the Civil War and the Black Codes*

With the end of the Civil War and with the abolition of slavery, the nation faced difficult issues: the status of the former Confederate states and the status of the newly freed slaves. With slavery abolished, the former slaves would count as whole persons, rather than three-fifths of a person, for purposes of representation in the House of Representatives and for purposes of votes in the electoral college.¹⁵⁴ The prospect that the Confederate states, having lost the war, would ride back into political power on the backs of disfranchised former slaves was intolerable to the Republicans and most of the North.¹⁵⁵ Andrew Johnson set up provisional governments in the former rebel states, and the former Confederate states sought admission to Congress.¹⁵⁶ Congress refused to seat delegates from the former Confederacy while it decided on terms for reunion.¹⁵⁷

The former rebel states all ratified the Thirteenth Amendment, as President Andrew Johnson required.¹⁵⁸ But these states and localities passed Black Codes to regulate the newly freed African Americans.¹⁵⁹ For example, St. Landry Parish, Louisiana, prohibited blacks from passing within the limits of the parish without special permit in writing

152. *Id.* (emphasis added).

153. *Id.*

154. U.S. CONST. art. I, § 2.

155. CURTIS, *NO STATE*, *supra* note 1, at 14.

156. CURTIS, *FREE SPEECH*, *supra* note 1, at 358–59.

157. *Id.*

158. *Id.*

159. *Id.*

from their employer; from being out after ten o'clock at night without special permission; from keeping or renting a house within the parish; from holding public meetings after sunset or at any time without special permission in writing from the captain of the patrol; from preaching, exhorting, or otherwise declaiming to colored people without special permission from the president of the police jury; from carrying firearms within the parish without special permission; and from selling, bartering, or exchanging articles of merchandise without special written permission from their employer specifying the article to be traded.¹⁶⁰ These codes discriminated based on race and (if one assumed, as many Republicans did, that states should obey the Bill of Rights), they abridged Bill of Rights liberties such as speech, assembly, religion, and the right to bear arms.

In 1866, Congress considered responses. Generally applicable guarantees of liberty (guarantees that protected all citizens), in addition to a guarantee of equal protection, were two reciprocally-reinforcing ways to grant equality to newly freed slaves and to protect loyal whites in the South.

2. *The Issues in Congress*

When Congress assembled in late 1865 and in 1866, congressmen discussed what sort of reconstruction should be required in the former rebel states before their full restoration.¹⁶¹ In the face of the Black Codes and reports of abuse by loyal whites from the South, Republican congressmen concluded that slavery was being revived in a new guise.¹⁶² Once again, basic liberties of Americans were being abridged.

A number of congressmen recalled the suppression of speech and opinion, both in the slave states and in the Kansas territory, which had had slavery and a slave code like that of slave states.¹⁶³ Indeed, the 1856 Republican Platform complained about denials of civil liberty in the Kansas Territory:

The right of the people to keep and bear arms has been infringed.

. . . .

The right of an accused person to a speedy and public trial by an impartial jury has been denied;

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, has been violated;

160. CONG. GLOBE, 39th Cong., 1st Sess. 516-17 (1866) (ordinance of Opelousas, La.).

161. CURTIS, *NO STATE*, *supra* note 1, at 57.

162. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 785 (1866) (Rep. Ward).

163. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 783, 1013 (1866) (Rep. Plants on Kansas); CURTIS, *NO STATE*, *supra* note 1, at 32-33 (discussing John Bingham's concerns about laws passed by the Kansas Territorial Assembly).

....

... [T]he freedom of speech and of the press has been abridged[.]¹⁶⁴

In January, Congressman Bingham recalled that it had been unsafe to advocate equality on the streets of Charleston because “in defiance of the Constitution its very guarantees were disregarded.”¹⁶⁵ Congressman Baker insisted on a restoration in which “the American citizen shall no more be degraded . . . by being required to surrender his conscience as a peace-offering to either an imperious or a suing aristocracy of class.”¹⁶⁶ Senator Timothy Howe said it was generally agreed by “the American people . . . that opinion and speech ought to be free” but that “[w]hoever raised his voice against [slavery] has been silenced or banished.”¹⁶⁷ He emphasized the need to protect *both* the freedman *and* the loyal whites in the South.¹⁶⁸ In a later speech Bingham said the Joint Committee was considering an amendment giving the Congress express power to enforce rights which were guaranteed from the beginning, but which had been disregarded.¹⁶⁹ He warned that congressmen who thought the Congress already had the power to enforce “all the guarantees of the Constitution” were mistaken.¹⁷⁰ A corrective amendment was needed.

Bingham looked forward to an amendment by which Congress would be “empowered to provide by law that hereafter no State shall make it a crime for a man, whether he be black or white, a citizen of the Republic, to learn the alphabet of his native tongue and his rights and duties.”¹⁷¹ Several congressmen called for a constitutional amendment empowering the Congress “to carry out and give effect to every guarantee of the Constitution.”¹⁷²

3. *An Early Version of Section 1 and the Civil Rights Act*

Congress responded to the Black Codes by passing the Civil Rights Act of 1866.¹⁷³ It made all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, “citizens of the United States.”¹⁷⁴ Section 1 of the Act continued:

[S]uch citizens, of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue,

164. NATIONAL PARTY PLATFORMS, *supra* note 95, at 27.

165. CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866).

166. *Id.* at 462.

167. *Id.* at 167.

168. *Id.* at 168.

169. *Id.*

170. *Id.* at 429.

171. *Id.* at 432.

172. *Id.* at 741 (Sen. Lane).

173. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27.

174. *Id.*

be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and *to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .*¹⁷⁵

The problem was where to find the constitutional power to pass the Act. Republicans suggested various sources of power, including the new Thirteenth Amendment.¹⁷⁶

Another theory looked to Article IV, Section 2 and its provision that the citizens of each state should be entitled to all privileges and immunities of citizens of the several states. The problem was that, by the majority judicial understanding, these privileges were defined by state law and the Clause only protected temporary visitors with the same privileges that citizens of the state they visited enjoyed.¹⁷⁷ Once a person became a resident of a state, states could decide what rights different classes of residents would enjoy. Some, however, relied on a reading of Article IV by which it protected fundamental rights of citizens, even after they became state residents.¹⁷⁸

Others found the power to pass the bill in the power of Congress to enforce the Bill of Rights, and particularly the guarantee in the Fifth Amendment.¹⁷⁹ Both Bingham and James Wilson, chair of the Judiciary Committee, described the Civil Rights Act as enforcing the Bill of Rights. Wilson asserted that power; Bingham denied it.¹⁸⁰ A related theory of congressional power combined the guarantee of republican government in Article IV with the Bill of Rights, treating the Bill of Rights as limiting both the states and the federal government and as setting an appropriate standard for republican government.¹⁸¹

Bingham denied that Congress had the power to pass the Civil Rights Bill.¹⁸² A constitutional amendment was required. Bingham had proposed an amendment providing congressional power.

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each States all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.¹⁸³

175. *Id.*

176. CURTIS, NO STATE, *supra* note 1, at 79.

177. *See, e.g.,* Scott v. Sandford (*Dred Scott*), 60 U.S. (19 How.) 393, 575-76 (1857).

178. CURTIS, NO STATE, *supra* note 1, at 73.

179. CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (Rep. Thayer); *id.* at 1294 (Rep. Wilson).

180. CURTIS, NO STATE, *supra* note 1, at 82. For a related theory of congressional power, see CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866), which discusses the views of Senator Nye.

181. CONG. GLOBE, 39th Cong., 1st Sess. 1072 (1866) (discussing the views of Senator Nye).

182. *Id.* at 1291; *id.* at 1294 (James Wilson on Rep. Bingham and power to pass the Civil Rights Bill).

183. *Id.* at 1034 (Rep. Bingham).

In the debate over this early version of the Amendment, requiring states to obey the Bill of Rights (which Bingham suggested was his aim) was not controversial.¹⁸⁴ What was controversial was the power to secure to all persons in the states equal protection in the rights of life, liberty, and property.¹⁸⁵ That, critics charged, would allow the Congress to take over the entire domain of state law.¹⁸⁶ Representative Giles Hotchkiss noted that problem, as well as a second defect.¹⁸⁷ The Amendment depended on the action of Congress. What one Congress gave, another (after an influx of rebels) could take away. Hotchkiss seems to have focused on the equal protection language:

Now, if the gentleman's object is . . . to provide against a discrimination to the injury or exclusion of any class of citizens in any State from the privileges which other classes enjoy, the right should be incorporated into the Constitution. It should be a constitutional right that cannot be wrested from any class of citizens . . . by mere legislation. But this amendment proposes to leave it to the caprice of Congress . . .¹⁸⁸

The first version of Bingham's amendment was postponed. The first version had several defects. It did not explicitly limit the states, so it left the doctrine of *Barron v. Baltimore* undisturbed. Second, Bingham relied on his reading of Article IV, Section 2, "the citizens of each state shall be entitled to all privileges and immunities [of citizens of the United States] in the several states."¹⁸⁹ By this reading, the Clause protected fundamental national rights. But most courts read the Clause to protect only out-of-state temporary visitors from discrimination in some rights under state law.¹⁹⁰

4. *The Final Version of the Amendment*

The final version of the Amendment was much improved. It made all persons born or naturalized in the United States citizens of the United States and of their state.¹⁹¹ It explicitly limited the states and sought to protect national rights of citizens of the United States, not state-law rights repealable under state law.¹⁹² The new version provided for congressional enforcement in Section 5.¹⁹³

184. CURTIS, NO STATE, *supra* note 1, at 91.

185. *Id.* at 81–83.

186. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866) (Rep. Hale).

187. *Id.* at 1095.

188. *Id.*

189. CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859); *see also* CURTIS, NO STATE, *supra* note 1, at 60–61.

190. *See, e.g., Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 575–76 (1857).

191. U.S. CONST. amend. XIV, § 1.

192. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (Rep. Stevens).

193. *See* U.S. CONST. amend. XIV, § 5.

Senator Jacob Howard presented the Amendment to the Senate on behalf of the Joint Committee on Reconstruction.¹⁹⁴ He said the Privileges or Immunities Clause was "a general prohibition upon all the States, as such, from abridging the privileges and immunities of citizens of the United States."¹⁹⁵ He said the Clause protected both privileges and immunities under Article IV and the rights in the Bill of Rights.¹⁹⁶ As to Article IV privileges and immunities, he cited "the case of *Corfield vs. Coryell*"¹⁹⁷ and quoted from it extensively.¹⁹⁸ Howard continued:

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities . . . should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances . . . ; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.¹⁹⁹

It was

a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as citizens of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation.²⁰⁰

Here Howard stated the holding of the *Barron* case. He continued, "The great object of the first section of this amendment is . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."²⁰¹

In his speech on the Fourteenth Amendment, Bingham explained that it would "protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within

194. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866); CURTIS, No STATE, *supra* note 1, at 87.

195. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

196. *Id.*

197. 6 F. Cas. 546 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3230).

198. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

199. *Id.*

200. *Id.*

201. *Id.* at 2766.

its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.”²⁰²

Representative Thaddeus Stevens quoted Section 1 and suggested that “every one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States.”²⁰³ Stevens continued, apparently focusing on equal protection: “Whatever law protects the white man shall afford ‘equal’ protection to the black man.”²⁰⁴ Stevens said it was only *partly true* that the Civil Rights Bill secured the same things, but “a law is repealable by a majority.”²⁰⁵ Senator Richard Yates discussed Section 1 briefly. Speaking of Section 1, he said it made people born in the nation citizens and “it provides that their rights shall not be abridged by any State.”²⁰⁶ Several other congressmen also described the Amendment as protecting “all the rights of citizenship” or “the rights of American citizenship.”²⁰⁷ Representative Jehu Baker quoted the Privileges or Immunities Clause and asked, “What business is it of any State to do the things here forbidden? To rob the American citizen of rights thrown around him by the supreme law of the land?”²⁰⁸

Except for Bingham and Howard, no one explicitly said that Section 1 would require states to obey the guarantees of “the Bill of Rights” and no one explicitly contradicted them.²⁰⁹ The lack of references to “the Bill of Rights” is not particularly surprising. The rights in the Bill of Rights are some, but not all, of the privileges or immunities of citizens of the United States.²¹⁰ When he spoke about the Amendment in 1871, Bingham said the privileges or immunities of citizens of the United States were “chiefly” set out in the first eight Amendments, which he read word for word.²¹¹ He also said that after his earlier draft had been postponed, he reread *Barron v. Baltimore* and focused on Chief Justice Marshall’s observation that if the framers of the Bill of Rights had intended to limit the states, they would have followed the example of the Framers of the original Constitution and used “no state shall” to prohibit the states from

202. *Id.* at 2542.

203. *Id.* at 2459.

204. *Id.*

205. *Id.*

206. *Id.* at 3038.

207. CURTIS, NO STATE, *supra* note 1, at 89–90.

208. CONG. GLOBE, 39th Cong., 1st Sess. app. at 255–56 (1866). For other comments less explicitly supportive of application (and, some would say, not supportive), see, for example CURTIS, NO STATE, *supra* note 1, at 85–91.

209. CURTIS, NO STATE, *supra* note 1, at 216.

210. See, e.g., U.S. CONST. art I, § 8, cl. 3; *id.* § 9, cl. 2–3; *id.* amend IX.

211. See CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871).

violating the rights.²¹² "Acting upon this suggestion," Bingham explained, "I did imitate the framers of the original Constitution."²¹³ So he used the "no state shall" form used in Article I, Section 10.²¹⁴

Though no one explicitly contradicted Bingham and Howard, it is true that some people in Congress said things that some writers have read as inconsistent with application of the Bill of Rights.²¹⁵ That is also true of the political campaign of 1866.²¹⁶ A comprehensive discussion of these matters is beyond the scope of this Article.²¹⁷ I will, however, discuss one common description. Some treated Section 1 as equivalent to the Civil Rights Act. That was a common description both in Congress and in the congressional elections of 1866.²¹⁸ Critics have assumed the Civil Rights Act merely provided equality in rights under state law.²¹⁹ So they treat these statements as inconsistent with application of the Bill of Rights.²²⁰ On reflection, however, that view is not convincing.

Recall the wording of the Civil Rights Act. After declaring that persons born in the country were citizens, the Act provided:

[S]uch citizens, of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and Territory in the United States . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens²²¹

The privileges and immunities in the Bill of Rights are, of course, provisions for the security of person and property. There was a long history of referring to provisions for the security of person and property

212. *Id.*

213. *Id.*

214. *Id.*

215. See, e.g., CURTIS, *Historical Linguistics*, *supra* note 1, at 1110-38.

216. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 2511 (1871) (Rep. Eliot seeming to refer to the Privileges or Immunities Clause as prohibiting discrimination against classes of citizens); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 77 (1949).

217. For additional material, see, for example, Fairman, *supra* note 216, at 43-68 (discussion in Congress), and at 68-81 (discussion in 1866). Other authorities provide a different interpretation of these matters. See, e.g., AMAR, *supra* note 14, at 191, 193, 197-99, 200, 202 (critiquing Fairman); *id.* at 193-97 (critiquing Berger); CURTIS, *No State*, *supra* note 1, at 57-91 (congressional debate); *id.* at 131-45 (campaign of 1866); Aynes, *Misreading*, *supra* note 19, at 78-83 (discussion in Congress); *id.* at 67-69 (campaign of 1866); Crosskey, *supra* note 20, at 11-84 (congressional debate); *id.* at 100-04 (discussion in 1866). See generally Wildenthal, *Revisiting*, *supra* note 19 (reviewing the scholarly debate and evidence). For other critiques of the incorporation doctrine and discussions of evidence, see, for example, BERGER, *supra* note 21; James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 464-67 (1985); and Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: Here I Go Down That Wrong Road Again*, 74 N.C. L. REV. 1559 (1996).

218. CURTIS, *No State*, *supra* note 1, at 78.

219. See BERGER, *supra* note 21, at 154-55; NELSON, *supra* note 21, at 115.

220. See CURTIS, *No State*, *supra* note 1, at 86 n.212.

221. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27 (emphasis added).

to describe rights such as those in the Bill of Rights.²²² In his treatise, Chancellor Kent describes these rights in that way.²²³ The usage appears in Supreme Court cases, before and after the Fourteenth Amendment.²²⁴ Finally, a virtually identical phrase was used in an early version of the Freedman's Bureau Act of 1866.²²⁵ The bill had provided for "full and equal benefit of all laws and proceedings for the security of person and estate, *including the constitutional right of bearing arms*."²²⁶ The phrase, "including the constitutional right of bearing arms" was proposed as an amendment and the change was accepted.²²⁷ Senator Lyman Trumbull said it did not change the meaning of the section.²²⁸

Claims that Section 1 was equivalent to the Civil Rights Act make no sense unless the Act was understood to encompass federal constitutional rights in the Bill of Rights. Section 1 contained a Due Process Clause that was clearly more than a guarantee of equal procedures. It would not do, for example, to decide all cases by a flip of the coin or by placing a hot iron on the tongue—even if that procedure were applied equally to all litigants. So suggestions that Section 1 was equivalent to the Civil Rights Act imply that the Act contained a federal standard of due process. Note that the Civil Rights Act required not just the "equal" but the "full" and equal benefit of laws and proceedings for the security of person and property.²²⁹ Deciding cases by a flip of the coin might pass a mere equality test, but it could hardly be described as providing the full benefit of provisions for the security of person and property. That is also so for other Bill of Rights liberties. Senator James Dixon said "Congress has given us, in the Civil Rights Act, a guarantee for free speech in every part of the Union."²³⁰

5. *The Campaign of 1866 and Ratification, 1866 to 1868*

There are two ways to look at these discussions. One can insist that the phrase "the Bill of Rights" be included in discussions of Section 1. By this approach, which I reject, there are a limited number of speeches and

222. *E.g.*, 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1-14 (William M. Lacy ed., Phila., Blackstone Publ'g Co. 1889) (1827); see also Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 923, 932 (1986) (discussing Kent and reliance on him in the Thirty-Ninth Congress).

223. See *supra* note 222.

224. *Boyd v. United States*, 116 U.S. 616, 635 (1886) (describing Fourth and Fifth Amendment rights as "constitutional provisions for the security of person and property"); *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 449-50 (1857).

225. See CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).

226. *Id.* (emphasis added).

227. *Id.* at 654, 743, 1292.

228. *Id.*

229. Avaim Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 683-84 (1979) (pointing out the significance of the word "full").

230. CONG. GLOBE, 39th Cong., 1st Sess. 2332 (1866).

publications that meet the test. Senator Howard's speech, including its description of the Privileges or Immunities Clause and the Bill of Rights, was reprinted in the *New York Herald* (the nation's most widely circulated paper at the time), the *Philadelphia Inquirer*, the *New York Times*, and several other papers.²³¹ A later 1866 article in the *New York Times* discussing the Amendment said it would require the states to obey the Bill of Rights.²³² Bingham published his February 1866 congressional speech on the earlier version of his Amendment in a pamphlet entitled *In Support of the Proposed Amendment to Enforce the Bill of Rights*.²³³ Bingham's speeches on the earlier version and his reference to enforcing the Bill of Rights were reported in the *New York Times*.²³⁴

A couple of treatises published in 1868 did say the Amendment would extend the protections of the Bill of Rights to the states. For example, as Richard Aynes has shown, New York University law professor John Norton Pomeroy, in his treatise *An Introduction to the Constitutional Law of the United States*, "described the first eight amendments as the 'immunities and privileges guarded by the Bill of Rights,'" and said Section 1 would change the rule to require states to respect the Bill of Rights.²³⁵ Professor Aynes also notes that George W. Paschal's *Constitution of the United States Defined and Carefully Annotated*, published in 1868, also supported application.²³⁶ Paschal said the citizenship clause constitutionalized the Civil Rights Bill and then added that "[a]ll else in this section has been guarantied in the second and fourth section of the fourth article; and in the thirteen amendments. The new feature . . . is that the general principles, which have been construed to apply only to the national government, are thus imposed upon the States."²³⁷

231. See CURTIS, NO STATE, *supra* note 1, at 89 n.220.

232. Curtis, *Bill of Rights*, *supra* note 1 (manuscript at 4 & n.8).

233. JOHN A. BINGHAM, ONE COUNTRY, ONE CONSTITUTION, AND ONE PEOPLE: SPEECH OF HON. JOHN A. BINGHAM, OF OHIO, IN THE HOUSE OF REPRESENTATIVES, FEB. 28, 1866, IN SUPPORT OF THE PROPOSED AMENDMENT TO ENFORCE THE BILL OF RIGHTS (1866) (on file at the Library of Congress). The cover page of the pamphlet appears on the inside back cover of AMAR, *supra* note 14.

234. Wildenthal, *Revisiting*, *supra* note 19, at 1557-58 (summarizing the *Times* reporting).

235. Aynes, *Misreading*, *supra* note 19, at 89 (quoting JOHN N. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES, at i (1868)). Richard Aynes was a trail blazer on this topic. For recent discussion of treatises at the time, see, for example, Wildenthal, *Revisiting*, *supra* note 19, at 1590-600; and George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627, 1647-49 (2007).

236. Aynes, *Misreading*, *supra* note 19, at 85-90.

237. *Id.* (emphasis omitted) (quoting GEORGE W. PASCHAL, THE CONSTITUTION OF THE UNITED STATES 290 (1868)). Professor Aynes also cites Judge Timothy Farrar's *Manuals of the Constitution* to the same effect and as supporting Bingham's contrarian reading of *Barron*. See *id.* at 83-85 (citing TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES (1867); TIMOTHY FARRAR, MANUAL OF THE CONSTITUTION OF THE UNITED STATES (1872)). Thomas Cooley's 1868 treatise on constitutional limitations and some on criminal procedure did not discuss the Fourteenth Amendment's first section. See THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS

Most of the references to Section 1 that refer to the Bill of Rights in those words that have been discovered are set out above. The rights of American citizens included, but were not limited to, those in the Bill of Rights. There are a number of published statements in 1866 through 1868 that support the idea that personal rights enumerated in the Constitution will limit the states under the Fourteenth Amendment. These statements should be read in the context of the broader historical context of the Amendment set out above. For example, the Republican National Committee published an address carried by a great many Republican papers explaining Section 1: "All persons born or naturalized in this country are henceforth citizens of the United States, and shall enjoy all the rights of citizens ever more; and no State shall have power to contravene this most righteous and necessary provision."²³⁸ A convention of pro-Republican soldiers and sailors described the Amendment as defining American citizenship and said it "guarantees all his rights to every citizen."²³⁹ An editorial in the *Dubuque Daily Times* said the Amendment "prohibits any state from making laws to abridge the privileges rightly conferred on every citizen by the federal constitution, which instrument, before, only neglected to define who were entitled to the benefits it conferred."²⁴⁰ A letter published in the *New York Tribune* referred to suppression of abolitionist sentiments in the South. The writer said,

The rights of American citizens, not only to enjoy their rights, but to protection in the full enjoyment of them, is now the dogma of the hour. At last it is to be asserted that it is the paramount duty of the government to protect its citizens in the full enjoyment of all constitutional rights, among which are the right to free speech, and to be secure in their personal property, as well as in redress of their grievances.²⁴¹

The Convention of Southern Loyalists convened in Philadelphia in September 1866, after Congress had adjourned and sent the Fourteenth Amendment to the states.²⁴² Its proceedings were widely reported in the Republican press.²⁴³ The call for the convention explained the issue facing the country: "*To the loyal unionists of the South:* The great issue is upon us. The majority in Congress, and its supporters, firmly declare that

WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Lawbook Exch., Ltd. 1998) (1868).

238. CURTIS, NO STATE, *supra* note 1, at 131 (quoting GALENA WEEKLY GAZETTE (Ill.), Sept. 25, 1866, at 2).

239. *Id.* (quoting BURLINGTON HAWK EYE (Iowa), Sept. 28, 1866, at 1).

240. *Id.* at 132 (quoting Editorial, DUBUQUE DAILY TIMES, Dec. 3, 1866, at 2).

241. *Id.* (quoting reprint in DUBUQUE DAILY TIMES, Dec. 3, 1866, at 2).

242. *Id.* at 133.

243. *Call for a Convention of Southern Unionists*, N.Y. TIMES, July 12, 1866, at 1; *Call for a Convention of Southern Unionists*, TITUSVILLE MORNING HERALD (Pa.), July 14, 1866, at 1; *Call for a Convention of Southern Unionists*, DAILY GAZETTE (Iowa), July 16, 1866, at 1.

'the rights of the citizen enumerated in the Constitution, and established by the supreme law, must be maintained inviolate.'"²⁴⁴ On the other hand, "Rebels and Rebel sympathizers assert that 'the rights of the citizens must be left to the States alone, and under such regulations as the respective States choose voluntarily to prescribe.'"²⁴⁵ The call asserted that "no State, either by its organic law or legislation, can make transgression on the rights of the citizen legitimate."²⁴⁶ It agreed with the plan of Congress "whereby protection is made coextensive with citizenship."²⁴⁷ It also demanded "protection to every citizen of this great Republic on the basis of equality before the law."²⁴⁸

An appeal issued by the Convention to their fellow citizens recalled the suppression of civil liberty in the South before the war.²⁴⁹ The report to the convention of the Committee on Non-Reconstructed States complained that "[t]he laws passed in the days of slavery for its protection are enforced with the same exactness today."²⁵⁰ It listed a host of violations of the liberties in the Bill of Rights: "Citizens have been arrested on the charge of having told negroes that they were rightfully entitled to vote, thrown into prison, retained for months, tried by a judge without a jury, refused time to send for witnesses or counsel, convicted and sentenced to punishment in the penitentiary."²⁵¹ It also demanded impartial suffrage and equality before the law.²⁵²

Congressman Baker's speech, suggesting that the Amendment would protect the "rights thrown around [American citizens] by the supreme law of the land," was reported in the *Chicago Tribune*.²⁵³ A number of speakers referred to the Amendment's protection of the rights of citizens and mentioned specifically freedom of speech, arms, and petition.²⁵⁴

In later sessions of Congress a number of congressmen and senators endorsed the idea that the Privileges or Immunities Clause of Section 1 required states to obey guarantees in the Bill of Rights.²⁵⁵ Some said

244. *Proceedings of the Convention*, N.Y. TRIB., Sept. 4, 1866, at 1.

245. *Id.* (setting out the call for the convention).

246. *Id.*

247. *Id.*

248. *Id.*

249. CURTIS, NO STATE, *supra* note 1, at 134-35.

250. WASH. EVENING CHRON., Sept. 9, 1866, at 1.

251. *Id.*

252. *Id.*

253. Fairman, *supra* note 216, at 71 n.130 (referring to publication in the *Chicago Tribune*).

254. E.g., CURTIS, NO STATE, *supra* note 1, at 137 (Gov. Hamilton on speech); *id.* at 137-38 (Gov. Hawley on arms and the right to petition and also referring to "every right guaranteed . . . by the Constitution"); *id.* at 138 (Sen. Yates referring to the right of Northerners to speak in the South and citing Article IV, Section 2 as protecting that right).

255. See, e.g., CURTIS, NO STATE, *supra* note 1, at 160-68; Curtis, *Bill of Rights*, *supra* note 1; STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-

other things.²⁵⁶ We have seen Bingham's explicit speech in 1871 describing the Privileges or Immunities Clause as applying the first eight Amendments to the states. Senator Henry Wilson expressed his agreement with Bingham.²⁵⁷

C. CONSTITUTIONAL STRUCTURE

The question raised by application of the Bill of Rights to the states was whether we would be one nation with national minimum standards of civil liberty. As Chief Justice Lumpkin of the Georgia Supreme Court noted before the Civil War, the country was in fact one nation, and protecting its citizens from attacks on their liberties from the federal but not state governments was an incomplete protection of the American citizens.²⁵⁸ It was false to assume, Lumpkin said, that "a National press and State press, were quite separate and distinct."²⁵⁹ Instead it should

constantly be borne in mind, that notwithstanding we may have different governments . . . we have but *one* people . . . and that it is in vain to shield them from a blow aimed by the Federal arm, if they are liable to be prostrated by one dealt with equal fatality by their own.²⁶⁰

IV. THE BILL OF RIGHTS IN THE *SLAUGHTER-HOUSE CASES*

In a series of decisions, the Court held, first by implication, and then expressly, that the Bill of Rights did not limit the states under the Fourteenth Amendment. In the *Slaughter-House Cases*, the Court began with a "cursory glance" at the post-Civil War Amendments "in connection with the history of the times."²⁶¹ The cursory glance disclosed a unity of purpose—to protect the newly freed slaves.²⁶² The majority discussed slavery and the Black Codes and noted that "[i]t was said" that the lives of the newly free slaves "were at the mercy of bad men" from lack of adequate protection.²⁶³ Curiously, the majority expressed doubt that circumstances of the newly free slaves were so dire: "These circumstances, *whatever of falsehood or misconception may have been*

1876, at 62–64 (1998); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1116–25 (2000).

256. E.g., CONG. GLOBE, 42d Cong., 1st Sess. app. at 114–17 (1871) (Rep. Farnsworth, mostly discussing state action, but also suggesting the Privileges or Immunities Clause was about discrimination against blacks); *id.* at 576 (Sen. Trumbull, equating the Privileges or Immunities Clause with the Clause of Article IV).

257. *Id.* app. at 256 (Sen. Wilson: "I concur entirely in the construction put upon that provision of the fourteenth amendment by Mr. Bingham, of Ohio, by whom it was drawn.").

258. *Campbell v. State*, 11 Ga. 353, 366 (1852).

259. *Id.*

260. *Id.*

261. 83 U.S. (16 Wall.) 36, 67 (1873).

262. *Id.* at 71.

263. *Id.* at 70.

mingled with their presentation, forced upon the statesmen" who had proposed the Thirteenth Amendment "the conviction that something more was necessary."²⁶⁴

The Court's history was a half truth. It left out the history of suppression of free speech and civil liberties in the South before the Civil War, suppression in the interest of slavery. It left out the fact that Republicans could not even campaign in the South. It left out the fact that open supporters of the Republican Party had been driven from their states because of their opinions. It left out the oft-expressed concern in the Thirty-Ninth Congress for white loyalists and Republicans in the post-Civil War South.²⁶⁵ It omitted the fact that the Codes also abridged the rights of African Americans to preach, to assemble and petition, to speak, and to bear arms.²⁶⁶ And, of course, it omitted the views of Republicans such as Congressmen John Bingham and James Wilson, Senator James Nye, and others that Bill of Rights liberties should limit the states under a proper understanding of the Constitution.²⁶⁷ The Court also said nothing about the speeches of Senator Howard and Representative Bingham.²⁶⁸

After its radically incomplete history, the Court moved on to the text of the Amendment. In its textual discussion, the Court distinguished between the privileges or immunities of United States citizenship and those privileges and immunities derived from state citizenship.²⁶⁹ The majority noted that the pre-Civil War Constitution set only a few limits on state power in the interest of citizens' civil rights, such as the prohibition on *ex post facto* laws.²⁷⁰ Fair enough. But the Court next held that privileges and immunities of state citizenship embraced "nearly every civil right for the establishment and protection of which organized government is instituted."²⁷¹ "Was it," the Court asked rhetorically, "the purpose of the fourteenth amendment . . . to transfer the security and protection of all the civil rights we have mentioned, from the States to

264. *Id.* (emphasis added).

265. See CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864); CONG. GLOBE, 36th Cong., 1st Sess. 930-31 (1860) (Rep. Edgerton); *id.* at 1872 (Rep. Waldron); *id.* at 2321 (Sen. Harlan); *id.* app. at 205 (Rep. Lovejoy); CURTIS, NO STATE, *supra* note 1, at 33, n.57. See generally *id.* at 57-83.

266. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 516-17 (1866) (ordinance of Opelousas, La.). See generally *Slaughter-House Cases*, 83 U.S. at 57-83.

267. See, e.g., CURTIS, NO STATE, *supra* note 1, at 37-38 (James Wilson in 1864); *id.* at 49-50 (same); *id.* at 80-81 (James Wilson in the Thirty-Ninth Congress); *id.* at 53-54 (Sen. James Nye); see also *supra* notes 179-80, 182-84, 189 and accompanying text (discussing the views of Rep. Bingham). See generally *Slaughter-House Cases*, 83 U.S. at 57-83.

268. See *id.*; CONG. GLOBE, 39th Cong., 1st Sess. 2542-43 (1866) (Rep. Bingham); *id.* at 2765-66 (Sen. Howard).

269. *Slaughter-House Cases*, 83 U.S. at 72.

270. *Id.* at 77.

271. *Id.* at 76.

the Federal government?"²⁷² If so, Congress would have enforcement power that would allow it to void all sorts of state laws whenever Congress "in its discretion" thought the privileges or immunities were abridged by state legislation.²⁷³ But that was not all. Congress could pass laws before states acted to deny rights. This would be a "great . . . departure from the structure and spirit of our institutions," giving Congress power over the "most ordinary and fundamental" state powers.²⁷⁴ In a puzzling passage, the majority said:

The language is, "No State shall make or enforce any law which shall abridge the *privileges or immunities of citizens of the United States*." It is a little remarkable, if this clause was intended as a protection to the citizen of a State *against the legislative power of his own State*, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it.²⁷⁵

So, by the Court's reading, "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" seemed not to be aimed at limiting state legislative power.

After suggesting that virtually all basic liberties existed, if at all, by state law, the Court proceeded to answer the suggestion that nothing was left of the Privileges or Immunities Clause: "But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some . . ."²⁷⁶ Citizens had the right to come to the seat of government,²⁷⁷ to visit the nation's sub-treasuries,²⁷⁸ to protection on the high seas and in foreign lands,²⁷⁹ to habeas corpus,²⁸⁰ to the right to use the navigable waters of the United States,²⁸¹ and to assemble and petition the national government (and only the national government, as it turned out),²⁸² and the right to go to and become residents of another state.²⁸³ Most, if not all, of these privileges existed, by a structural understanding, under the original Constitution. Southern states had not passed laws abridging the right of citizens on the high seas, in foreign lands, to go to Washington, D.C., or to visit sub-treasuries. It is quite remarkable. According to the majority's incomplete account, the Amendment was designed to protect the newly

²⁷² *Id.* at 77.

²⁷³ *Id.* at 78.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 74 (first and third emphases added).

²⁷⁶ *Id.* at 79.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 80.

freed slaves. In its very first guarantee, it protected them on their trans-Atlantic cruises and once they arrived in Paris.

The *Slaughter-House Cases* presented false alternatives: the utter destruction of federalism or substantial nullification of the Privileges or Immunities Clause. There was, of course, an unmentioned middle ground: protecting Bill of Rights liberties and a limited set of less textually explicit rights—at least from the states.

United States v. Cruikshank, decided in 1875, was the first case directly to address the Bill of Rights issue.²⁸⁴ The Court simply relied on *Barron* for the proposition that none of the guarantees of the Bill of Rights limited the states.²⁸⁵ It ignored the history of suppression of civil liberties in the South in the interest of protecting slavery. It ignored the historic usage of the words “privileges” and “immunities” to include Bill of Rights liberties. It ignored the speeches made in Congress by the leading proponents of the Amendment. It said, just eight years after ratification of the Fourteenth Amendment, that it was too late in the day to reconsider the *Barron* decision.²⁸⁶ By the Court’s view in *Cruikshank*, the inaccurately-named Bill of Rights did not stand for liberties all should enjoy. It merely limited the federal government.²⁸⁷ Citizens did not have the rights it listed—unless the states choose to secure them.²⁸⁸ American citizens still had to look to the states to protect their rights.²⁸⁹ While the Due Process Clause was still there, the Court said it, like the rest of the Fourteenth Amendment, “adds nothing to the rights of one citizen as against another.”²⁹⁰ Its protections were limited to violations by states; Klansmen and similar groups that were killing and terrorizing white and black Republicans because of their political opinions and actions were not states.²⁹¹ As to other guarantees, such as the right to bear arms, the situation was even worse. If the Amendment secured them (which it did not), still it was only a limit on state action. Protection of Bill of Rights liberties seemed largely beyond federal power—at least under the statutes Congress had passed to deal with the great evils of the Klan and similar political terrorism.²⁹²

284. 92 U.S. 542 (1875).

285. *Id.* at 552 (citing *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833)).

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 554.

291. See generally Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments and the State Action Syllogism, A Brief Historical Overview*, 11 U. PA. J. CONST. L. (forthcoming July 2009) (manuscript on file with the Hastings Law Journal).

292. See generally *Maxwell v. Dow*, 176 U.S. 581 (1900); *Hurtado v. California*, 110 U.S. 516 (1884); Curtis, *supra* note 291.

In 1908, in *Twining v. New Jersey*, the Court considered and rejected a claim that the privilege against self-incrimination limited the states.²⁹³ The Court acknowledged the claim that the first eight Amendments were among the privileges or immunities of citizens of the United States protected against state action, and it cited two of the four Supreme Court Justices who by that time had taken that view.²⁹⁴ In addition, the Court said this view “was undoubtedly . . . entertained by some of those who framed the Amendment.”²⁹⁵ But it was “not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court.”²⁹⁶

However, the *Twining* Court saw due process as a different matter, because in 1897 in the *Chicago, Burlington & Quincy Railroad* case, the Court had held the Due Process Clause protected against uncompensated takings.²⁹⁷ Based on that case, the *Twining* Court concluded that “some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action.”²⁹⁸ But if so, their presence in the Bill of Rights was just a coincidence. As to their possible protection, the Court explained that “it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.”²⁹⁹ The test was whether the right was “a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government.”³⁰⁰ For the Justices, at least, the privilege against self-incrimination failed the test.³⁰¹

In *Palko v. Connecticut*, the relation of rights protected by due process and some in the Bill of Rights was closer.³⁰² The Court said that some Bill of Rights liberties (those “so rooted in the traditions and conscience of our people as to be ranked as fundamental”³⁰³) had been “brought within the Fourteenth Amendment [Due Process Clause] by a process of absorption.”³⁰⁴ Curiously, Justice Cardozo described nearly all

293. 211 U.S. 78 (1908).

294. *Id.* at 98 (citing Justices Harlan and Field, in *Maxwell*, 176 U.S. at 606, 617 (Harlan, J., dissenting); *O’Neil v. Vermont*, 144 U.S. 323, 361 (1892) (Field, J., dissenting); *id.* at 370 (Harlan, Brewer, JJ., dissenting), but overlooking Justices Bradley and Swayne in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)).

295. *Id.*

296. *Id.*

297. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1896).

298. 211 U.S. at 99 (citing *Chicago, Burlington, & Quincy R.R.*, 166 U.S. at 240).

299. *Id.*

300. *Id.* at 106.

301. *Id.* at 110.

302. 302 U.S. 319 (1937).

303. *Id.* at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

304. *Id.* at 325–26.

the rights in the Bill of Rights with the collective phrase "privileges and immunities." Some of these "privileges and immunities" were protected by due process; other "immunities and privileges" in the Bill of Rights were not.³⁰⁵

In 1948, in *Adamson v. California*, Justice Hugo Black called for total application of Bill of Rights liberties to the states, and he persuaded three of his colleagues.³⁰⁶ Justice Black revisited congressional history and looked at congressional intent, particularly as revealed by leading framers of the Amendment.³⁰⁷ Justice Felix Frankfurter rejected the intent of leading framers.³⁰⁸ Instead, he said, one should look at the common understanding of the Amendment's words—though, curiously, he refused to look at the common meaning at the time of the words "privileges or immunities."³⁰⁹ He attributed his refusal to consider the common meaning of privileges or immunities to the "mischievous uses" to which the clause might be put.³¹⁰

During the 1960s, the Warren Court selectively applied most of the remaining liberties in the Bill of Rights under the Due Process Clause and used federal precedent to assess the dimension of the right.³¹¹ The application of Bill of Rights liberties to the states was explained in *Duncan v. Louisiana*, where the Court applied the guaranty of criminal jury trial to the states.³¹² The question was whether a particular right was fundamental to the Anglo-American scheme of ordered liberty.³¹³ The Court noted that jury trial was required by every state.³¹⁴ It emphasized the trend of later decisions applying Bill of Rights liberties to the states.³¹⁵ This undermined earlier decisions which had rejected application of the right to jury trial.³¹⁶

305. *Id.* at 326.

306. 332 U.S. 46, 71-74, 81 n.10 (1947) (Black, J., dissenting).

307. *Id.* at 71-74.

308. *Id.* at 63-64 (Frankfurter, J., concurring).

309. *Id.*

310. *Id.* at 61.

311. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process for obtaining witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment right to a speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (Confrontation Clause of the Sixth Amendment); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against compelled self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment); cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (constitutional right to privacy).

312. 391 U.S. at 150.

313. *Id.* at 149.

314. *Id.* at 154.

315. *Id.* at 148.

316. *Id.* (distinguishing *Palko v. Connecticut*, 302 U.S. 319 (1937); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Maxwell v. Dow*, 176 U.S. 581 (1900)).

V. REACTION

Warren Court decisions were controversial. The Court broadly applied the criminal procedure guarantees of the Bill of Rights to the states,³¹⁷ forbade the states to compose prayers for public school children to recite,³¹⁸ and issued a series of decisions undermining the racial caste system.³¹⁹ By 1968, the Court had even struck down bans on interracial marriage.³²⁰ Its decisions upholding congressional statutes banning discrimination in employment and in places of public accommodation,³²¹ and enforcing the right of African Americans in the South to vote,³²² were supported by most Americans but were still controversial.³²³

Barry Goldwater captured the Republican nomination for President in 1964.³²⁴ He strongly criticized the Warren Court.³²⁵ Along with his gifted supporter, Ronald Reagan, he opposed the Civil Rights Act of 1964.³²⁶ He said it violated states' rights.³²⁷ He later opposed the Voting Rights Act of 1965.³²⁸ Goldwater lost the election to Lyndon Johnson, but carried the deep South.³²⁹ In spite of the defeat, a "movement conservatism" was born.³³⁰ Johnson told his aide Bill Moyers that he had delivered the South to the Republican Party for both of their generations.³³¹

Movement conservatives and others attacked Warren Court decisions as activist and as not in keeping with the original understanding

317. See, e.g., *Duncan*, 391 U.S. at 161-62; *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

318. See, e.g., *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

319. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

320. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

321. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

322. *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).

323. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 204, 233-34, 238, 391-92, 495 (2000) (noting that the Civil Rights Act of 1964 passed by a 70% to 30% margin in both houses of Congress; the Voting Rights Act passed in the House of Representatives by a vote of 333 to 85 and in the Senate by a vote of 77 to 19). According to the Gallup Poll in May, 1964, between two otherwise identical candidates, 60% of the American public would favor one that took a strong stand in favor of civil rights. 3 *THE GALLUP POLL: PUBLIC OPINION 1935-1971*, at 1884 (1972).

324. DONALD GRIER STEPHENSON, JR., *CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS* 168 (1999).

325. See POWE, *supra* note 323. See generally STEPHENSON, *supra* note 324, at 163-89.

326. TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-1965*, at 356-57 (1998); LOU CANNON, *PRESIDENT REAGAN: THE ROLE OF A LIFETIME* 520 (1991).

327. BRANCH, *supra* note 326, at 523.

328. Joseph A. Loftus, *Goldwater Hits Vote-Rights Bill*, N.Y. TIMES, Apr. 2, 1965, at 24.

329. See U.S. Electoral College, 1964 Election for the Forty-Fifth Term, http://www.archives.gov/federal-register/electoral-college/votes/1965_1969.html#1964 (last visited June 10, 2009).

330. BRANCH, *supra* note 326, at 404-05; THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 94-95 (2004).

331. BRANCH, *supra* note 326, at 404-05.

of the Constitution.³³² The application of the Bill of Rights to the States was a particular target, denounced by prominent critics including Ronald Reagan's Attorney General, Edwin Meese.³³³ Mr. Meese distributed a speech to the ABA which described the incorporation doctrine as "a politically violent and constitutionally suspect blow to federalism" whose "intellectually shaky foundations" could not be "shored up."³³⁴ Law Professor Charles Rice described the doctrine as "flim flam under the 14th" and as a "fraud."³³⁵ George Will announced that the Court had taken a radically wrong turn when it applied the First Amendment to the states.³³⁶

Law professors joined in.³³⁷ Even those who agreed with the decisions applying the Bill of Rights liberties to the states announced that history did not support the application.³³⁸ Their views were supported by two Supreme Court Justices. In *Duncan v. Louisiana*, Justices Harlan and Stewart wrote that the "overwhelming historical evidence" marshaled by Charles Fairman (in a 1949, 173-page law review article) demonstrated "conclusively" that the framers and ratifiers of "the Fourteenth Amendment did not think they were 'incorporating' the Bill of Rights."³³⁹ Law professors who announced the absence of historical support for the "incorporation doctrine" often cited the Fairman article.³⁴⁰ Fairman's view was later reinforced by Raoul Berger, who wrote a spirited attack on incorporation in his celebrated and often inaccurate book, *Government by Judiciary*.³⁴¹

Critics like Berger and Fairman were influenced by the view that Reconstruction and the Civil War-era Republicans who had brought it were disreputable.³⁴² Though the South lost the Civil War, for many years it won the battle for the history of Reconstruction. Instead of being a second founding where Republicans sought to bring the nation closer to

332. Powe, *supra* note 325, at 204, 233-34, 238, 391-92, 495 (Goldwater's criticism of the Warren Court). See generally STEPHENSON, *supra* note 325.

333. See *supra* note 332; *infra* note 334.

334. Edwin Meese III, U.S. Att'y Gen., Address Before the American Bar Association (July 9, 1985), available at <http://www.fed-soc.org/resources/id.49/default.asp>. Mr. Meese did not read the words on the incorporation doctrine which he distributed to the press, and the cover page of the handout noted that "Mr. Meese may vary slightly from the text." *Id.*

335. Charles Rice, *Flimflam Under the 14th*, WALL ST. J., July 31, 1985, at 18.

336. George Will, *A Labored Ruling on Pornography*, GREENSBORO NEWS & REC., July 8, 1983, at A13.

337. CURTIS, NO STATE, *supra* note 1, at 2-4 (collecting examples).

338. *Id.*

339. 391 U.S. 145, 174 (1968) (Harlan, J., dissenting) (citing Fairman, *supra* note 216).

340. CURTIS, NO STATE, *supra* note 1, at 2, 4-6 (citing BERGER, *supra* note 21, at 137; Curtis, *Further Adventures*, *supra* note 1).

341. BERGER, *supra* note 21, at 57-69, 155-74.

342. See, e.g., BERGER, *supra* note 21, at 166 (citing BENJAMIN KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 192, 257 (1914)) (noting that Kendrick called Senator Howard a "Negrophile" and "reckless").

the ideals of the Declaration of Independence and the Preamble—and thus closer to democracy and civil liberty—the widely adopted Southern-elite view saw Reconstruction as a period of misrule imposed on the South by ignorant former slaves, venal Northerners, and disreputable Southern scalawags.³⁴³ By this view, Reconstruction was a time when “selfish politicians, backed by the federal government, for party purposes attempted to Africanize the State and deprive the people through misrule and oppression of most that life held dear.”³⁴⁴

The Southern-elite view of Reconstruction shaped too much of the view of scholars critical of applying the Bill of Rights liberties to the states. If Reconstruction was a time of misrule by selfish, crass, and corrupt Republican politicians, ignorant blacks, and disreputable Southern whites, then the framers of the Fourteenth Amendment look very different. In his 1939 biography of Justice Miller, published by the Harvard University Press, Charles Fairman referred to the Louisiana government supported by whites and blacks as the “carpetbag government.”³⁴⁵ According to Professor Fairman, when that government was removed (by terror and fraud, actually), “self government was restored in Louisiana.”³⁴⁶ In his effort to show that the views of Senator Howard, who strongly supported incorporation, were unrepresentative, Mr. Berger, in another book published by the Harvard University Press, quoted Benjamin Kendrick, a historian following the Southern elite’s approach to Reconstruction history: “Howard, according to Kendrick, was ‘one of the most . . . reckless of the radicals,’ who had ‘served consistently in the vanguard of the extreme Negrophiles.’”³⁴⁷ As Mr. Berger saw it, Howard’s reckless radicalism was established by the fact that he had held out “for black suffrage to the end.”³⁴⁸ The negative attitude toward Reconstruction by Professor Fairman and Mr. Berger may also help to explain their extraordinarily ad hominem attacks on Republicans such as John A. Bingham.³⁴⁹ But, as Michael Zuckert has

343. E.g., J. G. DE ROULHAC HAMILTON, *RECONSTRUCTION IN NORTH CAROLINA* 667 (Faculty of Political Sci. of Columbia Univ. eds., 1964) (1914); see also CHARLES FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT, 1862–1890*, at 180 (1939) (referring to the Reconstruction Republican government of Louisiana as the “carpetbag government” and suggesting that the overthrow of that government restored “self-government” in Louisiana). For the Southern elite inculcation of the view that the Civil War was about states’ rights and that slaves were happy and well-treated, see Fred Arthur Bailey, *Free Speech and the Lost Cause in the Old Dominion*, VA. MAG. HIST. & BIOGRAPHY, Apr. 1995, at 237.

344. HAMILTON, *supra* note 343, at 667.

345. FAIRMAN, *supra* note 343, at 180, 186.

346. *Id.* at 186. For additional negative comments by Fairman on Reconstruction, see the splendid article by Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1204 n.42 (1995).

347. BERGER, *supra* note 21, at 166 (quoting KENDRICK, *supra* note 342).

348. *Id.* (relying on KENDRICK, *supra* note 342).

349. See, e.g., *id.* at 164 (describing Bingham as “muddled”); *id.* at 219; Raoul Berger,

wisely noted, "Important historical actors . . . make sense to those around them; that is why they are important actors. The historian's task is to bring out their sense, not to denounce them as fools."³⁵⁰

In 1954, W. W. Crosskey wrote a 154-page response to Fairman's article in the *University of Chicago Law Review*.³⁵¹ Crosskey's article was trailblazing. Later scholars who have supported application of the Bill of Rights to the states are deeply indebted to his work. Unlike Professor Fairman and Mr. Berger, Professor Crosskey began to put Section 1 in the context of the thirty years or so that led up to the Civil War, including the suppression of civil liberty in the South in the interest of protecting slavery from criticism or political action.³⁵² Crosskey recognized and took seriously the constitutional ideas embraced by a number of leading Republicans, even when these did not accord with Supreme Court orthodoxy.³⁵³ His reading of the debates made sense, rather than nonsense, of what a number of leading Republicans had to say in the Thirty-Ninth Congress. And he showed that Professor Fairman had misconstrued significant parts of the debates.³⁵⁴

Justice Harlan and many law professors who expressed an opinion on the subject of application of the Bill of Rights to the states did not cite Crosskey's work.³⁵⁵ Presumably, they had not read it. Nor do they seem to have read that of Alfred Avins, no friend of the Warren Court, who reviewed the Crosskey and Fairman articles and concluded that Crosskey had the stronger case.³⁵⁶ In defense of the professors, most expressed their historical judgment in passing, not after detailed review of the historical evidence.³⁵⁷

However, among most scholars who have studied the issue in detail, the unquestioning acceptance of the work of Professor Fairman and of Mr. Berger has ebbed.³⁵⁸ That, at any rate, is the view of one who has

Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat, 42 OHIO ST. L.J. 435, 450 (1981) (describing Bingham as "veer[ing] as crazily as a rudderless ship" and as "unable to . . . understand what he read").

350. Michael Zuckert, Book Review, 8 CONST. COMMENT. 149, 161 (1991).

351. Crosskey, *supra* note 20.

352. *Id.* at 33-34 (citing Rep. Price); *id.* at 105-07 (states in the Pennsylvania legislature during ratification debate).

353. *E.g., id.* at 11-21 (old Republican legal ideas); *id.* at 27-28 (misreading Bingham); *id.* at 31 (misreading of Hale as opposing application).

354. *E.g., id.* at 10-21 (detailing how Professor Fairman misconstrued the Thirty-Ninth Congress debates).

355. See generally *Duncan v. Louisiana*, 391 U.S. 145, 171-93 (1968) (Harlan, J., dissenting) (not mentioning the Crosskey article).

356. See Alfred Avins, *The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1, 25-26 (1968).

357. See CURTIS, NO STATE, *supra* note 1, at 1-2 (discussing the various professors' analyses).

358. See, e.g., AMAR, *supra* note 14, at 183 ("In light of all this, it is astonishing that some scholars, most notably Charles Fairman and Raoul Berger, have suggested that when Bingham invoked 'the bill

been a participant in the ongoing debate for more than twenty-eight years.

VI. THE PARADOX

A. PARADOX ONE

If the Amendment was designed to apply the Bill of Rights to the states, how can we explain its utter failure for so many years? The brief civil-rights revolution after the Civil War was rapidly followed by reaction.³⁵⁹ By its continued war of terror and fraud against Reconstruction and equal rights, the Southern elite made clear that they simply would not accept government by the white-black majority coalition that for a time governed the South.³⁶⁰ National enforcement of civil liberties and of the right to vote, enforcement against Klan terror and against the newly “redeemed” state governments, stood in the way of finally ending the Civil War and in the way of national reconciliation.³⁶¹ In spite of the advances in the Civil War period, racism remained a powerful factor.³⁶² In an era of immigration and labor unrest, many opinion leaders in the North were increasingly skeptical of democracy.³⁶³ Some openly called for an abandonment of Reconstruction.³⁶⁴ Reconstruction in the South was abandoned by some of its former friends, and a resurgent Democratic Party and an increasingly big-business Republican one made further efforts unlikely.³⁶⁵ The Court did its part by undermining a number of Reconstruction statutes.³⁶⁶ The sad story has been told by a number of modern

of rights,’ he didn’t mean what he said.”); CURTIS, NO STATE, *supra* note 1, at 117–30; Aynes, *Misreading*, *supra* note 19, at 66–73. See generally JAMES BOND, NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1997); Bond, *supra* note 217; Wildenthal, *Revisiting*, *supra* note 19.

359. DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 130–31 (2001); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 119–20 (2000).

360. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 587 (1988). See generally Curtis, *supra* note 291.

361. BLIGHT, *supra* note 359, at 139.

362. *Id.* at 138 (citing the *Nation*, which announced on April 5, 1877, that the “negro will disappear from the field of national politics. Henceforth, the nation, as a nation will have nothing more to do with him.”).

363. KEYSSAR, *supra* note 359, at 119–24.

364. BLIGHT, *supra* note 359, at 98–139.

365. *Id.* at 130–39.

366. See generally *Giles v. Teasley*, 193 U.S. 146 (1904) (refusing to hear a challenge to discriminatory voting registration practices occurring under the Alabama Constitution of 1901); *Williams v. Mississippi*, 170 U.S. 213 (1898) (allowing facially-neutral devices designed to eliminate as many blacks as possible from the voting booths); *The Civil Rights Cases*, 109 U.S. 3 (1883) (striking down the Civil Rights Act of 1875 which prohibited discrimination in inns, railroads, steamboats, etc.); *United States v. Harris*, 106 U.S. 629 (1883) (denying federal power to punish members of a lynch mob); *United States v. Cruikshank*, 92 U.S. 542 (1876) (holding Bill of Rights liberties merely limited

historians.³⁶⁷ It is set out well in David W. Blight's book, *Race and Reunion*.³⁶⁸

B. PARADOX TWO

The case for application of substantive rights such as free speech and the right to bear arms is strong under the Privileges or Immunities Clause, but as we have seen that was not the route the Court took.³⁶⁹ Instead the Court proceeded under Due Process, and there is some historical support for reading the Clause to protect basic substantive liberties. For example, Charles Sumner, speaking in Congress in 1864 said that the Due Process Clause, "[b]rief as it is, it is in itself alone a whole bill of rights."³⁷⁰ Though *Cruikshank* stands in the way of applying the right to keep and bear arms to the states, *Cruikshank* supported this outcome by rejecting application of any liberty in the Bill of Rights to the states.³⁷¹ In that respect, it has been totally undermined. *Duncan* considered reliance on such a rejected view a reason to discount negative precedent on jury trial.³⁷² Almost all state constitutions protect an individual right to bear arms not limited to militia service,³⁷³ a fact *Duncan* considered significant as to jury trial.³⁷⁴ The *Heller* opinion presents much nineteenth-century evidence supporting a right to bear arms for self-defense.³⁷⁵ This may be fairly weak evidence of the meaning of the Second Amendment. But, if one assumes that the rights in the Fourteenth Amendment should be understood to be at least as protective as people at the time of framing and ratification understood them to be, this evidence supports the right of individuals to have arms for self-defense.

At any rate, if it applies the Second Amendment right to bear arms to the states, the Court will need to reject the equality-only reading. That is not hard to do. As we have seen, one common description of the Fourteenth Amendment was that it would protect all citizens in all their constitutional rights.³⁷⁶ Making African Americans citizens and granting all citizens fundamental constitutional rights, including those in the Bill

the federal government and not state or private actors).

367. See generally, e.g., FONER, *supra* note 360; CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008).

368. See BLIGHT, *supra* note 359, at 98–139.

369. See *supra* notes 293–305, 311 and accompanying text.

370. See CONG. GLOBE, 38th Cong., 1st Sess. 1480 (1864); Dripps, *supra* note 217, at 1579 n.111.

371. 92 U.S. 542, 552 (1876).

372. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) ("Maxwell held that no provision of the Bill of Rights applies to the States—a position long since repudiated . . .").

373. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2793–94, 2802–04 (2008).

374. 391 U.S. at 154.

375. 128 S. Ct. at 2790–94, 2805–12.

376. E.g., CURTIS, *NO STATE*, *supra* note 1, at 89–91, 131–45.

of Rights, was one of two ways to advance equality as well as liberty.³⁷⁷ In the Thirty-Ninth Congress, leading Republicans described the rights in the Bill of Rights as fundamental rights.³⁷⁸

In 1866 (and before), the privileges and immunities of free speech, free press, free exercise of religion, assembly, and the right to bear arms were seen as fundamental to freedom.³⁷⁹ The references in the Thirty-Ninth Congress to the right to bear arms as included among constitutional rights belies the equality-only reading.³⁸⁰ So does the antislavery origins of the Fourteenth Amendment and of its Privileges or Immunities Clause. The history recounted in *Heller* strongly supports the understanding that the right to bear arms was, by the nineteenth century, a fundamental, individual privilege and immunity of citizens.³⁸¹ The *Heller* majority cited Joel Tiffany's "influential" *Treatise on the Unconstitutionality of American Slavery*.³⁸² Tiffany believed that the Federal Constitution protected American citizens "from the despotism of states at home" and that any state law that deprived citizens of the "rights, privileges, and immunities, granted by the Constitution" was void.³⁸³ The "privileges and immunities" of citizens of the United States were "all the guarantys of the Federal Constitution for personal security, personal liberty and private property."³⁸⁴ To further define these Tiffany listed rights in the Bill of Rights (including the "right to keep and bear arms").³⁸⁵ An adaptation of Tiffany's views influenced those Republicans who held a national liberties reading of the rights in Article IV.³⁸⁶

An opinion applying the right to bear arms to the states can follow *Duncan* and avoid assessing the historical evidence bearing on application of the Bill of Rights to the states under the Fourteenth Amendment. That avoids embarrassing facts and doctrinal complications. But if the Court repeats the nineteenth-century historical facts used in *Heller*, the ghost of the Privileges or Immunities Clause will

377. When, for example, all share the constitutional right to freedom of speech or free exercise of religion, to that extent, they enjoy equality.

378. CONG. GLOBE, 39th Cong., 1st Sess. 1294, 2766 (1866).

379. *Id.*

380. See, e.g., CURTIS, NO STATE, *supra* note 1 at 131–38 (every right set out in the constitution including the right to have arms); *id.* at 139–40 (constitutional rights including the right to bear arms were rights of citizens of the United States); *id.* at 141 (denials of right to bear arms and other rights basic to freedom); see also *id.* at 142 (broad reading of guarantees of the Civil Rights Act); *id.* at 143 (treating the Privileges or Immunities Clause as protecting the rights of American citizens and the Due Process Clause as "rather more than the Bill of Rights"); *id.* at 144–45.

381. 128 S. Ct. at 2790–94, 2805–12.

382. *Id.* at 2789, 2807 (citing JOEL TIFFANY, TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 117–18 (Mnemosyne Publ'g Co. 1969) (1849)).

383. TIFFANY, *supra* note 382, at 55–58, 87–88, 97.

384. *Id.* at 97.

385. *Id.* at 56–58, 97, 99.

386. See, e.g., CURTIS, NO STATE, *supra* note 1, at 37–38 (Rep. Wilson); *id.* at 59–61 (Rep. Bingham).

be haunting the feast. John Bingham and Jacob Howard are not mentioned in *Heller*, but since both support a right to bear arms under the Fourteenth Amendment,³⁸⁷ their absence from the application opinion would be very strange.

If the Court applies the right under due process and *Duncan*—and there are good reasons based on precedent and doctrine and stability to do so—it should frankly recognize that substantial evidence under the Privileges or Immunities Clause supports applying the Bill of Rights to the states, and it should acknowledge the great plans by John A. Bingham and Jacob Howard and others to nationalize basic protections for liberty.³⁸⁸ Of course, acknowledgement involves at least tacitly admitting what a mess the Court's early decisions on application made of things. Still, the Court could suggest that the purposes of these framers of the Fourteenth Amendment have largely been achieved under the Due Process Clause. So the history provides significant support for the result, even though the Court finds it unwise to change the clause on which it has historically relied.

In the alternative, the Court can continue to ignore the history leading up to the framing of the Fourteenth Amendment and the statements of leading framers. It can cherry-pick evidence about the right to bear arms and ignore the tree from which much of it comes. Perhaps, however, this is a time for candor and recapturing some of the lost history of our nation's second founding.

Heller may not change much. State constitutions typically protect the right to bear arms³⁸⁹ and courts may well give the right a reasonable interpretation. But things may not be that simple. Professor Alan Brownstein, in his brilliant article, suggests that a right to have arms for self-defense may undermine tort duties to keep the arms locked up or otherwise inaccessible so children cannot easily access them.³⁹⁰ The theory is that the right to have arms implies a right to use them for self-defense and immediate access may be a necessary part of that right—undermining trigger locks, requiring weapons to be locked up so children

387. CONG. GLOBE, 42d Cong., 1st Sess. app. at 84 (1871) (remarks of Rep. Bingham); CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (remarks of Sen. Howard).

388. See *supra* Part III.B.2–5.

389. See, e.g., ARIZ. CONST. art. II, § 26; COLO. CONST. art. II, § 3; N.C. CONST. art. I, § 30; OHIO CONST. art. I, § 4; PA. CONST. art. I, § 21; TEX. CONST. art. I, § 3; VA. CONST. art. I, § 13; W. VA. CONST. art. III, § 22. According to the Second Amendment Foundation Online, forty-four of fifty states have state constitutional provisions enumerating the right to keep and bear arms. Second Amendment Foundation Online, <http://www.saf.org> (follow “State Constitutional Protections” hyperlink under “Resources”) (last visited June 10, 2009).

390. Alan Brownstein, *The Constitutionalization of Self-Defense in Tort and Criminal Law, Grammatically-Correct Originalism, and Other Second Amendment Musings*, 60 HASTINGS L.J. 1205, 1226–27 (2009).

cannot get them, etc.³⁹¹ He also suggests that if the right to bear arms includes the right to use them for self-defense, self-defense cases involving arms may become federal questions.³⁹² This and grave problems of gun violence suggest the need to temper logic with prudence. *Heller* rightly recognized the need to cabin the right in the interest of public safety.³⁹³ If applying the right in *Heller* to the states federalizes all sorts of self-defense and tort cases and strips states of the ability to enact reasonable regulations to protect children and the public safety, then safety and federalism (along with children and others victims of negligence) may be unintended casualties.

CONCLUSION

In issues such as the meaning of Section 1 of the Fourteenth Amendment, the historical evidence is always going to be somewhat mixed. The task is to decide which hypothesis better fits the facts. To the extent that courts use history on questions of this sort, it is always going to be a question of the preponderance of the evidence. Application plus equality is consistent with a great deal of the evidence. The equality-only approach is not.

On historical questions, it is important to acknowledge cross currents and paradoxes. There is substantial evidence that a personal right to bear arms was one of the privileges the Fourteenth Amendment was designed to protect. Disarming African Americans was deeply obnoxious. But we should be cautious before endorsing the idea that gun rights would somehow have rescued African Americans from the horrors that followed. Well-armed Southern paramilitary groups, insisting on *their* right to acquire arms, were a spearhead of anti-Reconstruction terror.³⁹⁴ African Americans were typically poor and had less effective weapons.³⁹⁵ In most cases they had less military training.³⁹⁶ Economic realities left African Americans out-gunned and vulnerable in many ways.

What the Reconstruction governments needed was strong intervention from the North to protect freedom of political association, democracy, and the right to vote. The Court did its part to hobble statutes passed by Congress to protect liberty and democracy in the

391. *Id.* at 1231–44.

392. *See id.*

393. 128 S. Ct. 2783, 2816–17 (2008).

394. LANE, *supra* note 367, at 217–28.

395. *Id.* at 72, 93 (while the white attackers in *Cruikshank* had multiple guns, only two-thirds of the black men had even one gun and these were generally shotguns or otherwise inferior weapons).

396. *Id.* at 92–93.

Reconstruction South. And most in the North soon lost interest in protecting Southern Republicans and African Americans.³⁹⁷

History is full of ironies. Since the Warren Court, more “conservative” justices have cut back on—and occasionally repudiated—much of its work.³⁹⁸ But incorporation of the Bill of Rights seems to be here to stay, though the nature of the incorporated liberties is changing and may change further, sometimes in a more Gilded Age direction.³⁹⁹ The Roberts Court is likely to expand application of the Bill of Rights to the states in the case of the Second Amendment, while, for example, sapping the Fourth Amendment of some of its remaining effect. If the Court revisits the history it has ignored for so long and strongly supports the historical basis for the incorporation doctrine, that will be a victory for facts too long ignored. For those strongly committed to *individual* liberty, the victory may also be bittersweet because of retreat in other areas.

397. *Id.* at 249; see also BLIGHT, *supra* note 359, at 130–31, 135, 138–39.

398. Compare *United States v. Guest*, 383 U.S. 745 (1966), with *United States v. Morrison*, 529 U.S. 598 (2000); compare *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), with *Paul v. Davis*, 424 U.S. 693 (1976).

399. Compare *McConnell v. FEC*, 540 U.S. 93 (2003), with *FEC v. Wisc. Right to Life, Inc.*, 541 U.S. 449 (2007) (perhaps opening the door for corporate finance of political parties and through them of political campaigns, further corrupting the agency or fiduciary relation that should exist between representatives and the people they represent).